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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 502

RUSSELL H. SITTON, et ux.,
Petitioners,

v.

AMERICAN TITLE CO. OF DALLAS, et al.,
Respondents.

Petition for a Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

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Petition for a Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

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Your petitioners, Russell H. Sitton and wife, Barbara J. Sitton respectfully petition for the issuance of a Writ of Certiorari to review the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas in its cause number 16,594 styled as above.[1]

[1] Following is a complete listing of the respondents hereto: American Title Co. of Dallas, a corporation; Katherine H. Brown and husband, Jarvis L. Brown, pro forma; Leonard Cooksey Duckworth, doing business as Leonard Duckworth Agency; Trinity Universal Ins. Co., a corporation; Harry Clifton Summer, Jr.; Lawyers Surety Corp. and Mr. and Mrs. Walter J. Moorman.

OPINION BELOW

The opinion of the Court of Civil Appeals (A-35 to A-46 herein) is reported at 396 S.W. 2d 899.

JURISDICTION

This case was tried to a jury which returned a verdict completely favorable to the petitioners (A-26). Judgment *non obstante veredicto* by the trial court was dated and entered on January 21, 1965 (A-30); no opinion or findings of fact were rendered. The judgment (A-48) and opinion (A-35) of the Court of Civil Appeals affirming the denial of judgment on the verdict were dated and entered October 29, 1965. A timely Motion for Rehearing filed November 15, 1965 (A-48 to A-50) was overruled December 3, 1965 (A-50). Thereafter, petitioners' Application for Writ of Error to the Supreme Court of Texas (A-50 & 51) timely filed on January 3, 1966, was denied without opinion on March 9, 1966 (A-51) and a timely Motion for Rehearing in the latter court (A-51 & 52) filed on March 24, 1966 was overruled on April 6, 1966 (A-53). On June 17, 1966, this Court through Mr. Justice Black entered an Order extending the time to petition for certiorari to and including September 3, 1966.

Petitioners submit that they have been deprived of rights secured unto them by the Fourteenth Amendment to the United States Constitution. In addition, the opinion below holds that petitioner Sitton is barred from recovery because of his supposed failure to apply to the Veterans Administration for hardship relief which ruling requires a construction of 38 U.S.C., § 1820(a)(4). Petitioners rely on 28 U.S.C., § 1257(3) to invoke the jurisdiction of this Court.

QUESTIONS PRESENTED

1.

Does the Fourteenth Amendment require that the States observe the Second Clause of the Seventh Amendment providing that no fact tried by a jury shall be examined otherwise than according to the rules of the common law?

2.

Without weighing the credibility of the witnesses, is this a case where there is in the evidence, no room whatever for honest difference of opinion over the factual issue in controversy?

3.

Alternatively, was the action of the Texas courts in declaring that there is "no evidence" to support the jury's verdict so lacking in support that to give it effect would work that fundamental unfairness which is at war with due process and equal protection of the law?

4.

Did the Texas Court of Civil Appeals err in holding that a veteran who elected not to invoke the hardship provisions of 38 U.S.C. § 1820(a)(4) is barred from seeking relief from third parties for either:

(1) the amount of the mortgage foreclosure deficiency; or,

(2) any other damages resultant to the foreclosure of his G.I. loan?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

(Text at A-53 & 54)

The United States Constitution, Amendment Seven

The United States Constitution, Amendment Fourteen, Section 1

28 U.S.C., § 1257(3)

38 U.S.C., § 1820(a)(4)

Texas Constitution, Article I, Sec. 15

Rule 290, Tex. Rules Civ, Proc.

Rule 291, Tex. Rules Civ. Proc.

STATEMENT OF THE CASE

How Federal Question Was Presented Below

Petitioners' federally guaranteed rights were first invaded by the trial court's final judgment. They immediately took general exception and gave notice of appeal (A-32) which procedure, under state law, preserved all questions for review. The federal question was raised by points 13 and 14 of their brief to the Court of Civil Appeals (A-34). These points were expressly considered and overruled (A-45). They were raised again in Motion for Rehearing (A-48 to A-50). Petitioners further asserted in their motion that they had a right to elect to make payments on the foreclosure deficiency rather than apply to the Veterans Administration for hardship relief (A-50). The federal question was presented to the Supreme Court of Texas by points 8-A, 8-B, 4-B and 4-D of the Application for Writ of Error (A-50 & 51). It was again raised by points 8-A, 8-B, 8-C, 4-B and 4-D in Motion for Rehearing (A-51 & 52). Petitioners submit that certiorari should issue to the Court of Civil Appeals rather than the Texas Supreme Court because the former court is in possession of the record and the latter court refused a writ of error and issued no judgment on the merits.

Fact Statement

The Appendix contains numerous extracts of testimony (A-7 to 24), a copy of the forged deed (A-25) and the opinion below. The evidence is further developed under the topic "What the Record Reflects." We offer the following as sufficient to grasp the nature of the questions presented.

Russell H. Sitton, a veteran of the Korean conflict, conveyed the home which he had purchased under the Servicemen's Readjustment Act of 1944 to Walter J. Moorman, plumbing contractor and real estate investor. He later brought this action for conspiracy asserting that the real estate broker and title company who solicited his confidence and upon whom he relied, joined together with his grantee, misrepresented the transaction and committed forgery upon his deed.[2]

The key witness for the plaintiff was a loan service representative of the Veterans Administration, an unimpeached and unbiased witness who testified that both grantee Moorman and the vice-president of the title company admitted everything to him:

> "Q. * * * I believe, that it is your testimony that Mrs. Brown told you she had changed the deed? A. At Moorman's request, yes. * * * Moorman told me he had her do it and she told me she did it" (A-10).

For a full abstract of this testimony, refer to pages A-7 to 10. The Court's opinion ignores this testimony except to label one statement therein as "clearly hearsay" (A-40 & 41). Petitioners say the ruling is untenable. Even so, the Court's opinion further reflects the uncontrovertible facts that the alteration was made at grantee Moorman's request while the instrument was in the office of Mrs. Brown, the vice president and branch manager of the title company, and

[2] The notarial surety was dismissed before trial on the holding that for a notary to alter an instrument after executing his certificate and before the delivery thereof is not official misconduct. *Sitton v. American Ins. Co.*, 390 S.W. 2d 34 (Tex. Civ. App. 1965). Such holding has been described in Comments: The Notary Public, 16 Baylor L. Rev. 388, 395 as "an anachronism."

while it was under her dominion and control. The Court apparently took the position that petitioners have not sufficiently rebutted the possibility that it was all an innocent mistake.

Twenty-one (21) special issues (interrogatories) were submitted to the jury (A-26 to 30). It was charged that it was "the exclusive judges of the facts proved," the "credibility of the witnesses" and the weight of their testimony (A-26). It returned a verdict *entirely favorable* to the plaintiffs and awarded substantial actual and exemplary damages. Nevertheless, a judgment *non obstante veredicto* was rendered by the trial court and affirmed by the Court of Civil Appeals.

The Court's ruling in part was as follows:

> "Appellants * * * assert that the judgment *non obstante veredicto*, having been rendered * * * in the face of evidence of probative force * * * denied appellants due process and the equal protection of law guaranteed to them by * * * the Seventh and Fourteenth Amendments to the United States Constitution. The argument under these points does no more than * * * accuse the trial court generally of substituting its fact determination for that of the jury. Our attention is directed to no specific evidence supporting any part of the verdict; nor is it demonstrated how appellants' said constitutional rights were violated. Our examination of the record discloses to us no such evidence and no such violation" (A-45).

We submit the diametric contrary. We cannot visualize a stronger case of conspiracy. If the proofs in this case failed to even present issues worthy of the jury's consideration, we cannot hypothetically state any proofs that could have carried the case to the jury.[3]

[3] The Court's only reference to respondent Summer was to point out that petitioners had testified "that they were assured" by Summer and his assistant "that Moorman would assume the debt" (A-38). Respondent Moorman was obviously unwilling to do so and the representations were, to say the least, incorrect. The rela-

It is to be emphasized that petitioners have three independent claims for damages and they have been denied them all and have been adjudged responsible for court costs aggregating $1,260.70 as well. Petitioners have been denied of:

(1) Actual damages for "the amount of the deficiency due under the note in question after the foreclosure" (A-44).

(2) Actual damages for mental anguish and physical suffering.

(3) Exemplary damages appurtenant to either or both claims for actual damages.

There is considerable divergence of opinion regarding the circumstances under which damages for mental suffering will be allowed, but they are allowable to some extent in almost every jurisdiction. The Court's opinion concedes that in Texas the right to recover such damages is "well settled" (A-42). The matter is of no concern at this point because (1) there are other damages in the case and (2) the court chose to lay the case on a supposed lack of evidence. In refusing to allow recovery of the mortgage deficiency, the Court said:

> "Appellants complain * * * *of the failure* of the trial court to render judgment for the foreclosure deficiency, the amount thereof being uncontroverted. Appellants having relied exclusively on the theory of conspiracy to establish any liability against appellees,

---

tionship between the parties strongly indicates that the real estate broker was not misled by his customer. There is considerably more evidence in the record concerning respondent Summer which we developed in our amended brief, pp. 21-25, 34-38 and in our motion for rehearing, pp. 5-7, 20-22 before the Court of Civil Appeals. Both these documents have been filed in this Court to show the timely raising of the federal question. We will not go into further detail here because a conspiracy is composed of "two or more persons" (Brown and Moorman) and the substantial body of circumstantial evidence concerning Summer is not material to the granting of this petition.

> and this court having held that there was no evidence of a conspiracy to alter the deed in question, or of alteration of the deed as a result of conspiracy, it follows that there was no reversible error [in denying recovery]." (A-44 & 45)

It is to be further emphasized that petitioners have been totally deprived of their day in court. The circumstances under which new trials may be granted or remittiturs ordered on pain of new trial are not in the case because no such action was taken.

REASONS FOR ALLOWING THE WRIT

The Supreme Court has Never Ruled on the Application of the Second Clause of the Seventh Amendment to the States

The Seventh Amendment contains two distinct clauses:

> (1) "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and;"
>
> (2) "No fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Mr. Justice Story declared the two clauses severable in *Parsons v. Bedford*, 28 U.S. 433, 447-448:

> "But the other clause of the amendment is still more important, and we read it as a substantial and independent clause. * * * This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner [than by the] modes known to the common law. * * * "

Petitioners say that Clause Two is the "more important" because it insures that jury trial will be reality rather than promise. The people may feel secure having provided by Constitution and statute for jury trial but, to be effective, the provision must be implemented. For a judge to refuse

to call a jury where the law so provides would be an intolerable act of open defiance but for the same judge to override the jury's decision on the pretense of "no evidence" would be equally subversive of the law and far more insidious because the public is being deluded.

Numerous cases construing the *first clause* of the Seventh Amendment have held that it is not applicable to the states. Most of them are old. However, diligent and exhaustive research fails to turn up a single case where this court has directly and necessarily decided if clause two is applicable to the states. Any argument that the first is decisive of the second has been shown unacceptable. The entire question has been dormant for nearly forty years. It should be re-examined in the light of present-day constitutional principles.

Early Cases Viewing the Relationship Between the Seventh and Fourteenth Amendments

The Supreme Court was slow in answering the mandate of the Fourteenth Amendment. It was early declared that the Bill of Rights was not incorporated into the Fourteenth Amendment. Indeed, some early decisions almost reached the position of denying claims under the Fourteenth Amendment *because* the matter was covered in the Bill of Rights and ergo, *could not* be covered by the Fourteenth Amendment. Such absolutist thinking has been under continuous re-examination ever since.

The Seventh Amendment was treated not a bit differently from the others. The following early cases formed the basis of numerous rulings that the Seventh Amendment had no application to the states. None of them has anything to do with the power of the state judiciary to overturn jury verdicts.

The *Justices v. Murray*, 76 U.S. 274, concerned the federal, not the state judiciary. The Fourteenth Amendment, just

freshly adopted was not discussed. The latter portion of the statement that federal courts may not re-examine jury verdicts *even though the state courts might do so* was clearly dicta. *Edwards v. Elliott*, 88 U.S. 532, did no more than uphold a state statute which eliminated jury trial in certain cases. The petitioner's complaint in *Pearson v. Yewdall*, 95 U.S. 294 is unclear but the verdict was upheld rather than overturned. The case does not involve jury verdict re-examination.

On reflection, the same is true of *Walker v. Sauvinet*, 92 U.S. 90 upholding a Louisiana statute providing that where the jury fails to agree, the court may render a decision on the same evidence. The statute neither permitted verdicts to be overturned nor did it permit judges to substitute their findings for the opinion of the jury. The statute did no more than partially abolish jury trial, a situation having to do only with Clause One of the Seventh Amendment.

To analyze all subsequent cases discussing the relation of the Seventh Amendment to the states would violate all canons of brevity but they are tabulated in the Appendix (A-1 to A-6). None of them contains a direct and necessary holding that the state courts are not required to observe the Seventh Amendment restrictions on the overturning of verdicts.[4]

FELA Cases in the State Courts

The most frequently cited "later" case is the 1916 decision in *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211. The only necessary holding of this early FELA decision was that

[4] The cases of *St. L. & K. C. Land Co. v. Kansas City*, 241 U.S. 419, and *Wagner Electric Co. v. Lyndon*, 262 U.S. 226, confuse questions of *res judicata* and collateral attack with the Seventh Amendment. The question in both instances was the finality of a prior judgment and the result would have been the same whether the prior case was decided by judge or jury. See *Empire State-Idaho Mining Co. v. Hanley*, 205 U.S. 225.

majority verdicts do not violate due process. A majority verdict statute does no violence to "the traditions of the people of this nation."[5] However, the Court went on and adamantly declared it to have been "conclusively determined" that *none* of the first ten amendments, are applicable to the states. It was further declared that Congress in enacting the FELA "clearly contemplated" that FELA cases should be tried by state courts "in accordance with the modes of procedure prevailing in such courts." It appears to us that the views expressed regarding both the Bill of Rights and the FELA have been thoroughly rejected.

The FELA received no warmer reception in the courts than did the Fourteenth Amendment. There was "a noticeable tendency in earlier decisions" toward a "narrow intrepretation" of the FELA. 35 Am. Jur., Master and Servant, § 415. The discovery of the act commenced around 1940. In the case of *Brady v. Southern R. Co.*, 320 U.S. 476, this Court, even though denying recovery 5-4, held that while the state courts are not required to provide a jury at all in FELA cases, the jury's verdict must be weighed in accordance with rules of evidence established by federal law *which is precisely the rule for which your petitioners contend.* Other decisions have made it clear that a state court may not substitute its opinion of the facts for the jury's findings:

> "The fact that fair-minded men might reach different conclusions, emphasize[s] the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * as well as issues involving controverted evidence. * * * To withdraw such a question from the jury is to usurp its functions.
>
> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' * * * Reasonable care and cause and effect are as

[5] Concurring opinion, *United Gas Pub. Serv. Co. v. Texas*, 303 U.S. 123.

> elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries." *Bailey v. Central Vt. Ry.*, 319 U.S. 350.

In *Lavender v. Kurn*, 327 U.S. 645, it was held "It is no answer to say that the jury's verdict involved speculation and conjecture. * * * Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." In *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, it was held to be important to grant certiorari "when lower federal *and state courts* persistently deprive litigants of their right to a jury determination" (Emphasis supplied). In the recent cases of *Gallick v. Baltimore & O.R. Co.*, 372 U.S. 108, and *Dennis v. Denver & R.G.W.R. Co.*, 375 U.S. 208, the Court reiterated and re-enforced its position that not only are the observable physical facts for the jury, but that the inferences and deductions leading to the conclusion of liability are jury questions as well.

The foregoing cases all came up from state courts. This is the standard which the states must follow in trying FELA cases. FELA cases are statutory, but nothing on the face of the statute provides for a more liberal standard of jury trial than in other cases. We suggest that it is the re-examination clause of the Seventh Amendment and not the language of the statute which requires jury verdicts to be honored if any evidence can be found to support them. Such is the position taken by the concurring opinion in *Harris v. Penna. R. Co.*, 361 U.S. 15: "Jury trial—guaranteed by the *Seventh Amendment*" is "part and parcel of the remedy under this Federal Act *when suit is brought in state courts*" (Our emphasis).

The Standard for Weighing the Verdict in Other Cases

In *Dick v. New York Life Ins. Co.*, 359 U.S. 437, this Court relied on FELA decisions and held that it was the function of the jury, not the court to choose among conflicting in-

ferences. Again citing FELA cases in *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, this Court indicated that the same standards must be applied for weighing a jury verdict in all cases. The Court said that "neither we nor the Court of Appeals can redetermine facts found by the jury," that trial by jury is part of the remedy and "It is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions.'"

The rule has been repeatedly stated and applied. In an 1891 suit on a life policy containing a "non-drinking" clause, it was held:

> "It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. * * * We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted." *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 91.

Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 was a conspiracy action just as the case at bar. It was held that before taking the case from the jury, the evidence had to be viewed in the light most favorable to the opposing party and that it must receive "the benefit of all inferences which the evidence fairly supports." Further, "'(T)he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.'"

The case of *Phillips Pet. Co. v. Gibson*, 232 F. 2d 13 (5th, 1956) arose in Texas just as the case at bar. A welder working on an oil well drilling rig won a verdict for injuries sustained in an explosion. The Court of Appeals reversed concluding that the plaintiff failed to take any precautions for his own safety and was therefore barred from recovery. This Court reversed summarily thereby re-asserting that the failure of the plaintiff to observe the prudent man rule is as much a question of fact for jury determination as the

defendant's failure to do so. *Gibson v. Phillips Pet. Co.*, 352 U.S. 874. Petitioners Sitton have also been deprived of a jury verdict upon a court-made determination of failure to observe prudent man standards.

> "What is the significance of the Supreme Court's decision? Clearly it will not attempt to supervise the lower federal courts in all their applications of local law in diversity cases. * * * The conclusion is that the Supreme Court was not willing to go along with the Texas court in the determination of this issue as a matter of law by virtue of the local doctrine.
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> "No doubt the controlling matter here is the attitude of the Supreme Court towards the protection of jury trial under the 7th amendment. The doctrine of the Texas court is a transparent device to syphon off the power of the jury by converting a question of fact into a question of law.
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> * * * * *
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> "In Texas, especially, by virtue of its complex proximate cause and negligence *per se* doctrines buttressed by intricate and numerous special issues, jury trial has been greatly impaired. * * * The *Gibson* case may well open a broad attack on those doctrines where federal courts are constrained to follow what is apparently local substantive law but in fact only devices for restricting jury trial." Green, Protection of Jury Trial in Diversity Cases, 35 Tex. L. Rev. 768 (1957)

In *Mercer v. Theriot*, 377 U.S. 152, the plaintiff's decedent was killed by a hit and run driver. The plaintiff relied on circumstantial evidence alone. It was shown that the defendant had been drinking heavily immediately beforehand, that he passed by the scene of the accident close to the time of death, that the decedent was obviously struck by a car, that recent damage was found on the defendant's car and that a towel with blood-like stains was found beneath the seat by investigating officers. "The evidence was sufficient under any standard which might be appropriate—state or

federal. * * * The jury's verdict, therefore, should not have been disturbed." We suggest that when a deed is admittedly altered after its execution at a title company office at the request of the grantee, the jury is not obligated to believe that an innocent mistake occurred and that the evidence of conspiracy is here sufficient "under any standard which might be appropriate" even without the testimony of the V.A. agent that "Moorman told me he had her do it and she told me she did it" (A-10).

Other cases holding that the courts may not substitute their opinion of the facts for the findings of the jury are *Williams v. Carolina Life Ins. Co.*, 348 U.S. 802 (Accidental death claim; jury found the fatal heart attack was caused by deceased's falling from horse; Court of Appeals, 210 F. 2d 477, found other theories of death to be equally consistent and declared verdict based on "speculation". Verdict reinstated by Supreme Court.); and *Union Trust Co. v. Eastern Air Lines*, 350 U.S. 907 (Airplane crash; Court of Appeals, 221 F. 2d 62, 70-73, ordered new trial because testimony that plane attempted landing without permission so weak as to have "no probative force". Verdict reinstated by Supreme Court.).

All FELA cases cited came up from the state courts. The remaining cases were tried in the federal courts and principally involve diversity jurisdiction. The conclusion cannot be escaped that the Supreme Court of the United States considers that under Clause Two of Amendment Seven the role of the jury as the finder of fact is paramount. On these authorities, we submit:

(1) The Seventh Amendment clause against re-examination applies in full vigor to the state courts when they are hearing federal matters.

(2) The Seventh Amendment clause against re-examination applies with equal vigor to the federal courts when they are hearing non-federal matters.

(3) The only question remaining open is the one we present here today: Does the Seventh Amendment clause against re-examination apply to the state courts when they are trying non-federal matters? We say there should be no distinction.

The only conceivable reason for refusing to apply a uniform rule would have to lie in the policy of allowing wide latitude to the citizenry of a state in shaping their laws and institutions. But what theoretical basis is there for allowing more latitude in the one instance than in the other? We are dealing in every instance with the rights of the citizens of the United States. We submit that the latitude lies *with the people* and not with the judges of the state courts as individuals. When state judges call a jury in obedience to the mandate of their electorate and proceed to substitute their opinion of the facts for the opinion of the jury, they are perverting both state and national interests. It hardly appears that they are serving a sufficiently valid objective to warrant withholding from the citizens of the United States the full benefit of Clause Two of the Seventh Amendment to the United States Constitution.[6]

The Fundamental Nature of the Amendments

There has long been a minority view that the Fourteenth Amendment made the entire Bill of Rights applicable to the states. While this view has not prevailed, the Court has con-

[6] The *Bombolis* decision views with alarm the prospect that "hybridization" might occur and the procedure in "both state and Federal courts would from day to day depend * * * [upon] the mere subject matter of the controversy." With respect to federal diversity cases, the "hybridization" issue has been resolved by declaring that Clause One of the Seventh Amendment requires trial by jury even though state law may provide otherwise. *Simler v. Conner*, 372 U.S. 221.

Petitioners ask that the "hybridization" issue be resolved with respect to the state courts by declaring that Clause Two prevents the court from substituting its opinion for the findings of the jury regardless of the subject matter of the case.

tinued the process of selectively holding that various guaranties expressed in the first eight Amendments apply to state action. Even before the *Bombolis* decision, the adamant position there taken that the Fourteenth Amendment had no connection with the Bill of Rights had already been pierced in the case of *Chicago R. & Q.R. Co. v. Chicago*, 166 U.S. 226, where the Court without noticing that the same restriction was incorporated in the Fifth Amendment held that the Fourteenth Amendment prohibited the taking of property for public use without compensation.

In *Abington School Dist. v. Schempp*, 374 U.S. 203, 215-216, a long series of cases was cited leading up to the proposition that all phases of the First Amendment were included in "'the fundamental concept of liberty embodied in that (Fourteenth) Amendment.'"

It was frequently stated in the early cases that the Sixth Amendment does not prevent the states from abolishing jury trial in criminal cases. Some of the cases went even further and inferred that inasmuch as no jury trial was required of the states by the Sixth Amendment, it was not necessary for a fair and impartial jury to be furnished. Such untenable inferences have been completely rejected by a series of cases leading to the conclusion that wherever the state provides for the accused to be tried by jury, the Fourteenth Amendment requires that not only the trial but the arrest and all proceedings leading up to the trial fully comply with the Fourth, Fifth, and Sixth Amendments.

The prohibition against unreasonable searches and seizures was applied to the states in *Mapp v. Ohio*, 367 U.S. 643. It was held that the prohibition would be no more than "a form of words" unless enforced against the states in the same manner as enforced against the Federal government; that is, by completely excluding the contaminated evidence. *Id.* 655. Your petitioners would submit that jury trial is equally sub-

ject to being reduced to "a form of words" unless the re-examination clause is enforced against both state and Federal courts in the same manner.

> "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan*, 378 U.S. 1.

As matters now stand, the Supreme Court has decided that at least part of each of the first eight Amendments is sufficiently fundamental that the states are obliged under the Fourteenth Amendment to observe them—that is, all but the Seventh Amendment. This Court has not issued a decision directly concerning the application of the Seventh Amendment in the state courts for many years. It has never directly and necessarily ruled upon the application of the clause prohibiting the re-examination of jury verdicts.

Is Clause Two of the Seventh Amendment Fundamental?

Petitioners do not attack the first clause of the Seventh Amendment, they were provided with the form of jury trial but not the substance. Undoubtedly, it was concern that jury trial might be reduced to an empty formality which led the Framers of the Constitution to include a second clause in the Seventh Amendment and which led Mr. Justice Story into describing the Clause Two as "still more important" and "a substantial and independent clause."

A parallel situation was before this Court in *Smith v. Texas*, 311 U.S. 128 (Exclusion of minorities from grand jury service). May we paraphrase:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For [the Court to substitute its opinion of the facts for

the findings of the jury] not only violates our Constitution * * * but is at war with our basic concepts of a democratic society and a representative government. * * * The fact that the written words of a states' laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.

"Here, the Texas [Constitution and laws (A-54) hold out great promise.] But by reason of the wide discretion [inherent in the judicial process], it is equally capable of being applied in such a manner as practically to proscribe [any result which the individual judges might personally feel] to be undesirable. And from the record before us the conclusion is inescapable that it is the latter application that has prevailed in [Dallas] County." (Insertions ours)

As far as the "fundamentalness" of the civil jury is concerned, the fact that the citizenry of virtually every state has seen fit to insert a civil jury provision in its constitution speaks out more firmly for the right than all the texts and opinion.[1]

"The trial by jury is justly dear to the American people. * * * Every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union." *Parsons v. Bedford*, 28 U.S. 433.

Legal writers from the time of Blackstone have advocated jury trial in the strongest terms:

"The trial by jury is looked upon as the glory of the English law, * * * an advantage in regulating the civil property, * * * the most transcendant privilege, which

[1] For an analysis of state constitutional provisions for jury trial, see the appendix to Mr. Justice Frankfurter's article, Memorandum on "Incorporation" of the Bill of Rights, 78 Harvard L. Rev. 747, 768-783 (1965).

any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals. * * * Because Rome, Sparta and Carthage have lost their liberties, therefore those of England in time must perish. But it must be recollected, that those states, at the time when their liberties were lost, were strangers to the trial by jury." Blackstone's Commentaries, Gavit Ed. (1941) 689-90.

He struck at the entire *raison d'etre* of jury trial as follows:

"If [the impartial administration of justice] be entirely entrusted to the magistracy, a select body of men, usually chosen * * * by parties holding the highest offices in the state, their decisions will frequently have an involuntary bias toward those of their own rank and dignity; for it is not to be expected, that the few should be always attentive to the interests and good of the many.

* * * * *

"This, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens." Id., 690.

Blackstone's reasoning is as timely as tomorrow's newspaper. The judiciary as a class is poorly qualified to represent either the common man or the conscience of the community. The problem compounds as our nation matures, as the concentration of economic power and social prestige increases and as wealth is more frequently transmitted to the third and fourth generation. The centers of economic power and influence always hire the most skilled and experienced lawyers, drawing heavily from their own class. In a period of time, when those lawyers aspire to the judiciary, the same centers of economic power and influence will sponsor them both in reward for favors past and in anticipation of favors future. The ordinary plaintiff is lucky to find a lawyer, any

lawyer willing to undertake the risk that he will go uncompensated if the case fails. The client may think that there is only one adversary in the courtroom although his lawyer will often recognize that there are two, the defense lawyer and the defense-minded judge.

No law that we have ever heard of *requires* that the parties submit their case to a jury. The only reason that a jury is ever called in any case is that one or both parties is dissatisfied with the prospect of leaving the decision of the facts to the judge.[8] To call a jury in many instances is to do no more than equalize an unbalanced situation. The entire theory of our democratic society is one of checks and balances; power and control are to be distributed and counterbalanced to the greatest extent possible. The tendency of the judiciary to override jury verdicts, to substitute their opinion of the facts, is the tendency to destroy an essential element of our system of checks and balances.

> "A system of laws—however just—that exists only in theory is a slim basis for a claim to moral leadership. * * * We must not forget that the role of the courts is not merely to define the right; it is also to administer the remedy. Unless the remedy is actually applied to persons and things, the right is merely a pious idea." Foreword by the Hon. Earl Warren, Civil Justice and the Jury, Prentice-Hall, 1962.

> "A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. New York City*, 315 U.S. 752.

> "The Fifth, Sixth, *Seventh* and Eighth Amendments were directly and purposefully designed to confine the power of courts and judges. * * *

[8] Nor is the privilege to call a jury one-sided. It is equally available to a defendant who feels uneasy before a judge who made his career and reputation as a personal injury lawyer and who still enjoys addressing labor rallies.

> "As manifested by the Declaration of Independence, the denial of trial by jury and its subversion by various contrivances was one of the principal complaints against the English Crown. Trial by a jury of laymen and no less was regarded as the birthright of free men." *Green v. United States*, 356 U.S. 165, 208-209, (Dissenting opinion) (Emphasis supplied).

The Seventh Amendment has long since been held to be so fundamental that it must be followed in the territorial courts.[9] Conflicting statutes of Congress and the territories are not constitutional.

The second clause of the Seventh Amendment has long been considered as fundamental to the operation of the federal courts; so fundamental that it must be applied even in cases removed or otherwise brought up from the state courts.[10]

This Honorable Court acting under the Seventh Amendment has repeatedly declared that trial by jury should be enlarged, not restricted. It has discarded the old rule that when a case goes to the equity docket, the parties lose the right to a jury on claims at law.[11] Wherever possible, the legal issues are to be decided first and before a jury. When a common law claim and an admiralty claim are joined, the entirety is to be tried to a jury. *Fitzgerald v. United States Lines*, 374 U.S. 16. And, concerning the court martial of civilians abroad, the Court has reversed itself and declared that such may not be done. *Reid v. Covert*, 354 U.S. 1.

In *Simler v. Conner*, 372 U.S. 221, it was held that a Federal court must provide this fundamental right in a diversity case even though the state law provided to the contrary. "The federal policy favoring jury trials is of historic and continu-

[9] *Kennon v. Gilmer*, 131 U.S. 22; *Springville v. Thomas*, 166 U.S. 707; *Thompson v. Utah*, 170 U.S. 343; *Dill v. Ebey*, 229 U.S. 199.

[10] *Parsons v. Bedford*, 28 U.S. 433; *The Justices v. Murray*, 76 U.S. 274; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226.

[11] *Beacon Theatres v. Westover*, 359 U.S. 500; *Dairy Queen v. Wood*, 369 U.S. 469.

ing strength." Similarly, in diversity actions where the state's practice considers certain matters to be questions of law for the court, Federal courts must nevertheless submit them to a jury if they are, in essence, questions of fact. *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525; *Magenau v. Aetna Freight Lines*, 360 U.S. 273.

And, may we again point out that even though it has been held that a state is not required to afford a jury in FELA cases, this Court considers the "re-examination" clause sufficiently fundamental that it governs state court litigation under the FELA. It is the Seventh Amendment, not the statute that requires that jury verdicts be diligently upheld. *Harris v. Penna, R. Co.*, 361 U.S. 15 (Concurring Opinion).

Civil Jury trial stands on the same basis as criminal jury trial in our national Constitution and in practically all state constitutions. The Court has never reconsidered its early premise that the Fourteenth Amendment does not prevent the states from abolishing criminal juries. Nevertheless, a long line of decisions has progressively told the states that when an accused is brought before a jury, all the safeguards to a fair trial that are contained in the Bill of Rights must be employed. All that your petitioners ask is that similar safeguards be employed with respect to civil jury trial.

One thing cannot be more clear. Clause Two of the Seventh Amendment is fundamental to the vitality of the first, for it is the safeguard which converts promise into reality, prevents the delusion of the public, and raises the first to something more than a "pious idea." We question the decisions holding that the states may deny a civil jury but we do not attack them. We do ask this Court to look at civil jury trial and firmly declare:

"Abolish it if you will but usurp it never!!"

Arbitrary and Discriminatory Conduct is Directly Violative of the Fourteenth Amendment

Even if this Honorable Court should not feel ready to declare that the states should observe the re-examination

clause of the Seventh Amendment, this petition should still be granted on the strength of the Fourteenth Amendment alone.

Petitioners produced an unimpeachable and unbiased witness to testify that two of the respondents admitted everything. We cannot conceive how a stronger case could be presented. The holding of "no evidence" fails to meet any standard for testing the evidence, state or Federal. *Mercer v. Theriot*, 377 U.S. 152. To hold that the Seventh Amendment has no application to the states is not to hold that a litigant has no right to a fair trial or that jury trial may be reduced to pure ritualism with the court free to charge a jury that "You are the sole judges of the facts proved" (A-29 & 30) and thereafter disregard the jury's findings at will. Such regressive thinking was condemned in *Brown v. Mississippi*, 297 U.S. 278: "Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal."

In the landmark case of *Pennoyer v. Neff*, 95 U.S. 714, it was held there can "be no doubt" of the meaning of the terms, "due process" and "equal protection" when applied to judicial proceedings. "They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." The established procedures were not followed by the court below.

Texas law provides for jury trial (A-54) and provides that a verdict must be honored unless there is "no evidence" to support it.[12] One can't be sure but it appears that the Court held that Petitioners' G.I. deed was altered by mistake or at least, it might have been. But, it is the Court's finding of "innocent mistake" that is unsupported rather than the jury's finding of "willful misconduct."

[12] *Leyva v. Pacheco*, 163 Tex. 638, 358 S.W. 2d 547 (1962); *West v. Slaughter*, 384 S.W. 2d 185 (Tex. Civ. App. 1964).

A finding of "no evidence" is a fact finding in and of itself; it cannot be otherwise. Its essence is the same weighing and sifting of the documents and testimony as engaged in by the jury for resolution of the disputed facts. A judgment that is based on "no evidence" violates the guaranties of the Fourteenth Amendment.[13]

At the risk of sounding tautological, we submit that there is "no evidence" to support the Court's finding of "no evidence." When a court ignores testimony that "Moorman told me he had her do it and she told me she did it" (A-10), disregards the fact that competent conveyancers simply do not mutilate instruments in the manner shown by this record and proceeds to hold that the jury's verdict is demonstrably wrong and demonstrably unfounded, then it is the Court's finding, not the jury verdict which is "so totally devoid of evidentiary support as to render * * * [the holding] unconstitutional under the Due Process Clause of the Fourteenth Amendment." *Thompson v. Louisville*, 362 U.S. 199.

It was held in *Kilbourn v. Thompson*, 103 U.S. 168, 182 that due process of law requires a tribunal which "is to be governed by rules of law previously established." For a state constitution and state law to provide for the right of jury trial in civil actions and for the courts to subvert the jury verdict by substituting its opinion of the facts for the findings of the jury would be arbitrary if there were no standards by which a court might do so and would be discriminatory if such standards were not applied. Such conduct would be offensive to "those canons of decency and fairness which express the notions of justice of English speaking peoples." Frankfurter, J., concurring in *Malinski v. New York*, 324 U.S. 401, 417.

[13] *Creswill v. Grand Lodge*, 225 U.S. 4; *Fiske v. Kansas*, 274 U.S. 380.

Discriminatory procedures which involve the taking of property without compensation violate due process.[14] We earnestly suggest that a jury verdict is a vested right, a form of property, that cannot be taken away except through a settled course of judicial proceedings uniformly applied. *McCullough v. Virginia*, 172 U.S. 102. The Texas courts could not constitutionally have refused to proceed to judgment after rendition of this verdict for the express purpose of defeating petitioners' rights therein. By the same measure, the verdict may not be overridden with impunity without violating due process.

In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, the petitioner claimed deprival of its property by a discriminatory tax assessment. The state supreme court denied relief because the tax-payer had failed to make timely application to the state tax commission even though it had held by a prior decision that the tax commission had no power to grant relief. The discriminatory reversal of position after the deadline for filing with the tax commission had passed was held to violate the Fourteenth Amendment. This record shows the same type of discriminatory reversal of position, a complete refusal to uniformly apply established rules of law.

It is true as the *Brinkerhoff* case points out that mere error does not violate the Fourteenth Amendment else every erroneous decision would raise a federal question. However, as *Brinkerhoff* clearly holds, rulings which are arbitrary or discriminatory to the extent that they traverse "the fundamental standards of fairness" do violate the Fourteenth Amendment. Here, the court after specifically being apprised that juries are "the sole judges of the facts proved" proceeded to substitute its opinion of the facts for the find-

[14] *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (Condemnation proceedings); *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (Discriminatory taxation); *Panhandle Eastern Pipe Line Co. v. State Highway Comm.*, 294 U.S. 613 (Highway Commission may not require relocation of pipe lines at owner's expense.)

ings of the jury.[15] With all due respect, we submit that when the action taken departs the bounds of reasonable probability of mistake and reflects a conscious indifference to established rules of law, then a violation of due process has occurred. The distrinction is not too subtle to be practical. "Even a dog distinguishes between being stumbled over and being kicked." Holmes, The Common Law, Little, Brown & Co., 1938, p. 3. The rulings of the court reflect a conscious indifference to the established law and procedure, a chosen and predetermined effort not to apply the law and not to correctly construe the facts. Which is the more violative of due process, to render judgment where there is no evidence, or to usurp the jury verdict where there is plain evidence? *Schware v. Board of Bar Examiners*, 353 U.S. 232; *Thompson v. Louisville, supra*. We see no distinction.

The conscious indifference test is a meaningful and adequate means of distinguishing between permissible and impermissible types of judicial conduct. When the record reflects that the Court, being familiar with the law and the facts, is proceeding in opposition thereto either by choice or through conscious indifference, a violation of the Fourteenth Amendment guaranty of an orderly trial in accordance with established procedure in a competent tribunal is violated.

What the Record Reflects

> "Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. * * * (J)udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt." The Hon. Felix Frankfurter, Frontispiece, 1965—The Supreme Court Review, U. of Chi. Press.

[15] Again, we concern ourselves not with the rules for ordering new trials or granting remittiturs but only the rules for totally depriving a litigant of his day in court.

Every man is the product of his opinions, attitudes, friendships, leanings and loyalties. Judges are no exception. The Court did not proceed out of malice or evil motive but the record nevertheless shows that it departed the accepted course of judicial proceedings by "boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder." Blackstone's Commentaries, supra, 690.

The Court declared that it can find "no specific evidence supporting *any part of the verdict*" (A-45). This sweeping declaration includes the following holdings:

Held: There is no evidence (no proof cognizable in a court of law) that respondent Lawyers Surety Corporation was acting as surety for respondent Summer (Issue 9, A-27). Nevertheless, the record shows that a duly certified copy of this broker's bond was admitted in evidence (Ex. Vol., P-40).

Held: There is no cognizable proof that respondent Trinity Universal was acting as surety for respondent Duckworth (Issue 11, A-27). Again the record reflects a certified copy of this brokers' bond (Ex. Vol., P-41).

Held: There is no evidence that either respondent Summer or respondent Duckworth were engaged in the real estate business (Issues 8 and 10, A-27). The record reflects that petitioners found a sign in the yard of the Moorman property, that they called the number shown, that they reached, met and dealt with respondent Summer at the Duckworth office and that Summer testified that he worked for the Duckworth Company in the conduct of the real estate business (Testimony 144-147, 160, 7).

Held: There is no cognizable proof that Summer was employed in a managerial capacity (Issue 6, A-27). Summer testified as much and Mrs. Brown, with whom he was well acquainted, testified to the same effect (Testimony 7, 75).

Held: There is no evidence that respondent Summer was acting within the course and scope of his employment (Issue 7, A-27). Petitioners found him inside the offices of Duckworth Company and dealt with him at his desk for the purchase of property listed for sale by Duckworth Company (Testimony 144-145, 160). Respondent Duckworth although served with pleadings alleging course and scope, managerial capacity and the conduct of the real estate business failed to appear and testify. When a party to the action fails to testify on matters obviously within his knowledge, the inference arises that he had nothing to say.

Held: There is no proof cognizable in law that respondent Brown was employed by the title company in a managerial capacity (Issue 4, A-26) and yet, the president of the company himself identified her as vice-president and branch manager (Testimony 338-340).

Held: There is no cognizable proof whatsoever that petitioners' G. I. deed was altered after its execution. The same holding was made by overruling petitioners' point one (A-32) without discussion. Close examination of the original instrument (which has been transmitted to this Court) clearly reflects the alteration and respondents conceded as much. Respondents pitched their case before the jury, however, on the contention that the alteration was made before petitioners executed the deed and that petitioners consented to the substitution of grantees. The jury found otherwise. Both petitioners testified that the alteration had not been made when they signed their G.I. deed (Testimony 174-176, 309). The spurious grantee, Trout, testified that petitioners had already moved when he first saw their G.I. home (A-16). Moorman testified that he did not give the Sittons permission to move into their new house until he got his money and that he did not get the idea to have the deed made to Trout until after petitioners had moved (A-11, 12). The V.A. agent, McMaster, testified that respondents admitted the alteration (A-7 to 10).

Held: There is no evidence of a wrongful act, done intentionally, without just cause or excuse (Malice-Issue 21, A-29). The same ruling was made by overruling petitioners' point nine (A-34) without discussion. May we point out that respondents Summer and Brown both misrepresented the transaction (A-38), that petitioners were injured by persons who set out to draw legal instruments and to act as guardians of titles and that all three respondents acted with superior knowledge and experience. We particularly wish to point out that when Mrs. Sitton phoned these defendants and asked for help, they refused and attempted to convince her that she had signed an "open" deed (A-23 and 24). When confronted by McMaster, Moorman haughtily declared "that he washed his hands of it" (A-7 & 8). If forgery by fiduciary does not warrant the assessment of exemplary damages, we cannot visualize a case which does.

Held: There is no evidence, no cognizable proof whatsoever that any of the three principal defendants engaged in any conspiracy (Issues 2 & 3, A-26). Yet, the record clearly reflects testimony that the real estate agents and title officer all represented "that Moorman would assume the debt" (A-38), that Summer deliberately excluded any reference to assumption from the original sales contract (A-22 & 23), that the forgery was done at the title company offices and that "Moorman told me he had her do it and she told me she did it" (A-10). We repeat. We cannot hypothetically conceive of any additional evidence under which the Court would have allowed the case to go to the jury.

We pretermit discussion of the extensive evidence, including testimony by Mr. Sitton's doctor and employer, supporting the jury's findings under the issues concerning mental anguish and physical upset. The present question is whether petitioners are entitled to any damages whatsoever, mortgage deficiency damages, exemplary damages or even nominal damages. The question of what damages are allowable will arise after determination that both the Seventh and Four-

teenth Amendments were violated when the Court below, with no basis whatsoever, superimposed its opinion of the facts upon the findings of the jury.

State Law

We do not find where the Court ruled on any propositions of law. Including the final statement that the Court finds "no such evidence" that petitioners' "Constitutional rights were violated" (A-45), we count thirteen separate rulings of no evidence or the equivalent thereof in the opinion below. In closing, the Court magnanimously declared that petitioners had been given "every reasonable opportunity to make out a case" and "they failed to do so" (A-46). If there are any principles of state law which prevent recovery for this type of forgery, the Court could have succinctly stated them and would have been spared the necessity of buffetting the evidence so extensively. The fact that the Court cited no authority beginning to approach the facts of this case further shows that the Court concerned itself with evidence, not law.

At the same time, statements such as the one that the Court can find no evidence that any respondent conspired to do any act which nullified "any enforceable agreement" (A-40), injects doubt as to just what was the basis of the Court's ruling. In their Motion for Rehearing, petitioners requested several additional findings of fact distinctly separated from findings of law. (Apts. M./Rehg, etc., Ct. Civ. App., A-1-7). Even though the rules providing for the return of findings of fact speak in mandatory terms,[16] petitioners' request was overruled (A-50). Petitioners submit that if the Court presented any rulings on the law, they are without substance. If there is any doubt, the judgment of the Court of Civil Appeals should be vacated for further proceedings as in *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194.

[16] Rules 453-455, Tex. Rules Civ. Proc.

Texas follows the general law concerning conspiracy. The definition given by the Court (A-40) or an approximation thereof is widely accepted. Analysis of the cases shows that the tort has two well-defined elements: (1) joint endeavor and (2) individually tortious conduct. Neither intrigue nor immorality nor grossly unfair conduct make a conspiracy. With certain distinctions not here material, there must be conduct which would have been actionable if carried out individually. However, the conduct shown by this record was forgery, no less.

With respect to joint endeavor, the evidence shows that respondents solicited the trust and confidence of petitioners, that they represented that "Moorman would assume the debt" (A-38), that the forgery was performed "in the office of the title company" (A-38), that Moorman scouted up the spurious grantee (A-38), that Summer was the only one who could bring pressure to bear on the title company (A-19, 20 & 23), that he stood to lose a substantial commission when Moorman refused to conclude the transaction on the basis of an "assumption" deed (P's. Ex. 7, Exhibit Vol.), that all three told Mrs. Sitton the same false story about an "open" deed (A-23 & 24), and that respondents Brown and Moorman admitted everything to the V.A. representative (A-7 to 10). How can anyone maintain a straight face and declare that the record is devoid of evidence that the alteration was a product of the joint endeavor of "two or more persons" (A-40).[17]

The Court's opinion infers but fails to hold that there must not only be proof of tortious overt acts and participation therein, but that the plaintiff must further prove a nebulous element entitled "concerted action." There is no

[17] "Again, the liability of Summer is of secondary concern at this moment. Where several are charged with conspiracy, judgment may go for some and against others. *St. Louis & S.W.R.Co. v. Thompson*, 102 Tex. 89,113 S.W. 144 (1908) (Cited in opinion, A-42); *Underwood v. Winkel*, 249 S.W. 1111 (Tex. Civ. App. 1923).

such authority. Neither the Court's authorities nor the thirty case shotgun barrage laid down by respondents so holds.

However, our point is that, if any such mystical element is contained in the tort, it is a jury issue. It is a subjective finding just as the concepts negligence, proximate cause, foreseeability, malice aforethought, scienter, etc. The fact that such are wholly subjective and can never be proved or disproved to a certainty does not make them any-the-less *jury issues*. The jury was charged (Issue 2, A-26) on "concerted action" practically *ipsissimis verbis* with the opinion (A-40) and it returned in favor of petitioners. This, we present, is yet another instance of the substitution of the Court's opinion for the findings of the jury.

> "The Deputy Commissioner treated the question * * * as a question of 'fact.' Doing so only serves to illustrate once more the variety of ascertainments covered by the blanket term 'fact.' Here of course it does not connote a simple, external, physical event * * * Yet the standards are not * * * of such a nature as to be peculiarly appropriate for independent judicial ascertainment as 'questions of law.'" *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504.

Conspiracy, like negligence is a concept of tort law which "cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre," *Schulz v. Penna. R. Co.*, 350 U.S. 523, 525. It calls, therefore, "for the exercise of common sense and sound judgment under the circumstances of particular cases;" a fact issue for the jury. *Ibid.*

The Court speaks of nullifying an "enforceable" agreement and points out that the initial sales contract prepared by real estate agent Summer was silent concerning the assumption by Moorman of petitioners' G.I. loan. Petitioners say that respondent Summer in dealing with these people

of limited education deliberately omitted any such provision from the sales contract (A-22 & 23) while verbally assuring petitioners that Moorman would do so (A-38) and that he later prevailed on title agent Brown to make the alteration. Inasmuch as the initial agreement was silent regarding assumption, this was a matter to be covered by other agreements or negotiations. Any question was concluded by the terms of petitioners' G.I. deed and all other agreements and negotiations were merged therein. *Sunderman v. Roberts*, 213 S.W. 2d 705 (Tex. Civ. App. 1948) The Court itself overruled American's cross point urging that the contract controlled over the deed[18] (A-46).

In a single paragraph the Court declared there is no evidence that Moorman agreed to pay or that he accepted a deed obligating him to pay or would have accepted such a deed or that respondent Brown was his agent or that he ratified her conduct or that he knew of the assumption provision or that the instrument was ever delivered or that he ever accepted it. The Court further states that the instrument was altered before it was "delivered to any one" (A-41).

Most of these rulings fly straight in the face of the evidence, particularly the testimony of the V.A. agent; still another instance of Court-made findings in a jury case. We think that the law of agency, ratification, contracts, conveyances, etc., has no application and that the entire paragraph is wiped out by the final statement that this suit is "strictly one in tort." Call it forgery by joint endeavor or call it conspiracy, the elements are identical. The ruling is a virtual license to commit fraud to brokers and conveyancers. We ask: If Moorman had altered the instrument with his own hand while chanting "I do not accept, I will not pay, I do not ratify, I refuse to be obligated and I am

[18] Cross-Point 1. "The rights of the Appellants herein were no greater than those spelled out in the contract of sale and such contract of sale did not require any one to assume existing indebtedness on the Andover house." (Brief for American, et al. 49-50)

not taking delivery of this instrument," would his conduct or his declarations control? We further ask: Is the situation one whit different when he secures another to perform his forgery for him?

Nor is the testimony of McMaster, either in its entirety or the snatch thereof which the Court describes as "all we find," to be dismissed out of hand as "clearly hearsay" (A-40 & 41). The Court itself overruled Duckworth's Cross point attacking the McMaster testimony as hearsay[19] (A-46). The declarations by Moorman are *clearly admissible* against Moorman and the statements by Brown are *clearly admissible* against Brown. Taken together, they prove the conspiracy. The law could hardly be otherwise.[20]

The respondents filed a total of thirty cross-points, eight of which were sustained (A-46 to 48). Cross-points have the same function in Texas practice as a conditional motion for new trial in federal practice. They are filed as the basis for obtaining a new trial in case the judgment *n.o.v.* be reversed.[21] We do not think the matters therein contained are substantial but the proper disposition of these cross-points will not arise until this honorable Court elects to reverse.

Mental and Physical Suffering

Petitioners' right to recover for emotional upset and physical suffering pursuant to the numerous letters and collection contacts, the loss of credit and the impairment of Mr. Sit-

[19] Cross-Point 1. "The court erred in allowing the testimony of the witness Daniel H. McMaster over the timely objection of counsel that it was both hearsay and immaterial to any question properly before the court." (Duckworth Brief 31-32)

[20] The overruler without discussion of petitioners' point three (A-33) concerning the Statute of Frauds is clearly insubstantial. When an instrument is destroyed, the statute is satisfied by proving its former existence. *Patrick v. Badger*, 41 S.W. 538 (Tex. Civ. App. 1897) Such would be particularly true where the obligor caused the destruction in an effort to evade the obligation.

[21] Rule 324, Tex. Rules Civ. Proc.

ton's veteran's benefits is of secondary importance to this Court at the present because there are other damages in the case.[22]

This is not a "harrassment" case. The loan company demanded payment by letter and by phone but it had a right to do so. The V.A. did likewise. Demands by "The Federal Government" are apt to be quite upsetting to people of limited education but demands for payment by public or private agencies have a social utility and are privileged as long as they remain within wide bounds of reasonableness. In the case at bar, the gist of the tort is reckless and wilful interference with a valuable relationship. The intermeddler is liable for causing damages even though the ultimate actor is privileged. The best example is those cases where wilful intermeddlers cause employees at will to be discharged from their jobs. *Cotton v. Cooper*, 209 S.W. 135 (Tex. Comm. App. 1919); *Harris v. Trader's & General Ins. Co.*, 82 S.W. 2d (Tex. Civ. App. 1935).[23]

[22] The seriousness of the recurrence of Mr. Sitton's speech impediment cannot be captured on a written record but the jury received demonstrative evidence thereof. A medical witness described him as "very labile" and expressed concern that the events had "stirred up an emotional well". (Testimony 360-361) His employer corroborated his emotional upset and the decline in his work. (Testimony 353-356) After seeing him and hearing the evidence, the jury awarded him $30,000 (A-28).

Mrs. Sitton testified to continued upset over an extended period of time, compounded by worry over her husband's declining health. Her difficulties are not restricted to her fall from an automobile; they merely include this unfortunate fall. There is no doubt she fell, the only question is causation. The defendants objected that her fall had "no causal connection," the trial court ruled "It goes more to the weight than to the admissibility * * * I will allow the evidence to be considered" (Testimony 301-302). It thereafter asked the jury to fix her damages as a whole and the jury found her entire damages at $10,000 (A-29).

[23] Note also that in *St. Louis & S.W.R. Co. v. Thompson*, 102 Tex. 89, 113 S.W. 144 (1908), cited in the opinion, that a third party, the international union, innocently made the publication complained of and that the suit was against those wilfully *causing* the publication.

The law has long allowed compensation for emotional upset and attendant physical suffering in cases of wilful injury such as assault without physical battery, false imprisonment and more recently, invasion of privacy. While views are widely divergent, the present-day trend is to allow damages for emotionally induced injuries even in negligence cases. *Falzone v. Busch*, 45 N.J. 559, 214 A. 2d 12 (1965); *Battalla v. New York*, 10 N.Y. 2d 237, 176 N.E. 2d 729 (1961) As far as Texas law is concerned, the Court reviewed *the very cases upon which petitioners rely* and declared that recoverability is "now well settled" (A-42).[24] Nevertheless, it ruled that the plaintiffs could not recover because, *in the Court's opinion*, the petitioners failed to act as the ordinary and prudent man would act under the same or similar circumstances. Such ruling raises two federal questions:[25]

1) It appears to us that the alleged failure to apply to the V.A. for relief is more properly classifiable as failure to mitigate (which reduces damages *pro tanto*) rather than contributory negligence (which bars recovery). However, the label is unimportant. Whether we speak in terms of failure to mitigate or contributory negligence or assumption of risk or voluntary exposure to known hazards or various other labels, it is completely obvious when we look beneath the verbiage that the Court is ruling that the plaintiff violated the prudent man rule. We suggest that the plaintiffs' conduct is just as much a jury issue as the defendants' conduct and that the Court has indulged in "a transparent device to syphon off the power of the jury." Green, Protection of

[24] In addition, see *St. Louis & S.W.R. Co. v. Alexander*, 106 Tex. 518, 172 S.W. 709 (1915): *Houston Elec. Co. v. Dorsett*, 145 Tex. 95, 194 S.W. 2d 546 (1946) and *Stafford v. Steward*, 295 S.W. 2d 665 (Tex. Civ. App. 1956).

[25] The Court's ruling further violates local practice. Respondents waived the right to have the jury consider the plaintiffs' conduct by failing to present any pleadings or request any charge on the matter.

Jury Trial in Diversity Cases, 35 Tex. L. Rev. 768 (1957); *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359; *Hodges v. Easton*, 106 U.S. 408.

2) We further submit that the purpose and effect of the veteran's relief statute, 38 U.S.C., § 1820(a)(4), quoted and discussed in the Court's opinion (A-39 & 43) is strictly a matter of federal law. This statute was enacted for the protection of veterans, not for the protection of third parties who may contractually assume the veteran's loan. It is most assuredly not for the protection of forgers and intermeddlers. The veteran may elect not to invoke the protection of this statute. He has no duty or obligation in this respect to his grantee or to any intermeddlers. The failure to do what he is not required to do cannot constitute violation of the prudent man rule. Any other construction strips the veteran of protection afforded to him by Congress and thrusts private obligations off into the federal treasury. Rather than beg the government for charity, Mr. Sitton attempted to pay his obligation (Pleadings 25, Testimony 350-351). He had the absolute and unqualified right to do so without forfeiting any rights against third parties.

Certiorari is Necessary to Protect the Integrity of Trial by Jury

Special and important reasons for certiorari exist here because the state court has directly refused to be bound by Clause Two of the Seventh Amendment. (A-45) The application of the clause prohibiting the re-examination of verdicts is a matter which has never been heretofore determined by this Court. Any contention that the First Clause of the Amendment is dispositive of the Second is not in keeping with present-day principles of Constitutional Law. Aside from FELA cases, there has been no decision concerning the relationship of any part of the Seventh Amendment to the states for many years. Meanwhile, the judiciary has been proceeding to superimpose its findings

of fact for the opinion of the jury with increasing boldness and regularity. Professor Leon Green has thoroughly spotlighted the problem:

> "The taking over of the jury's functions in negligence cases by appellate courts has been steadily progressing everywhere but, I believe, in one other American jurisdiction at such a pace and so completely as in Texas. * * * In a jurisdiction where jury trial is embedded in the constitution, and at a time when the intelligence of laymen has risen to such a high level, the change is not so easily accounted for.
>
> * * * * *
>
> "There is nothing to prevent this invasion of the jury's province except the self-restraint of the judges themselves. * * * *The supreme power in a court system as in any other heirarchy inevitably increases with its exercise.*" Green, Jury Trial and Proximate Cause, 35 Tex. L. Rev. 357-358 (1958) (Emphasis supplied).[26]

Other writers have noted the tendency of the courts to substitute their opinion of the facts for the opinion of the jury.[27]

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest

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[26] Professor Green's views are further expressed in Green, Jury Trial & Mr. Justice Black, 65 Yale L.J. 482, 485-486 (1956); Green, The Thrust of Tort Law: II, 64 W.Va. L. Rev. 115, 134-135 (1962); Green, Duties, Risks, Causation Doctrines, 41 Tex. L. Rev. 42, 70-74 (1962); Green, Observations: The Importance of Identifying The Issue, 42 Tex. L. Rev. 835, 840 (1964).

[27] Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751 (1957); Blum, Origin and Development of the Directed Verdict, 48 Mich. L. Rev. 555 (1950); Tongue, In Defense of Juries As Exclusive Judges of the Facts, 35 Ore. L. Rev. 143 (1956). See also Kreindler, The Jury System in Tort Cases, 51 A.B.A.J. 736 (1965); Kalven, The Dignity of the Civil Jury, 50 Va. L. Rev. 1055 (1964); Sacks, Preservation of the Civil Jury System, 22 Wash. & Lee L. Rev. 76 (1965).

> desire to see that constitutional right preserved. * * * Our duty to preserve this one of the Bill of Rights may be peculiarly difficult for here *it is our own power which we must restrain.* * * * I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. * * * Appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances." *Galloway v. United States*, 319 U.S. 372, 407 (Dissenting opinion) (Emphasis supplied).

We do not seek to throw an impossible burden on the Supreme Court. Compared to the large number of felony convictions affirmed, the number of instances where state courts substitute their opinion of the facts for the findings of the jury is still quite small. But the trend is growing. "Two or three forthright decisions outlining the permissible limitations on jury trial as preserved by the 7th amendment" will go far to stem the tide. Green, Protection of Jury Trial in Diversity Cases, 35 Tex. L. Rev. 768, 771 (1957).

Jury trial is one of the fine checks and balances of our democratic society. The litigants are never forced to try their case before a jury, the jury is only called when a party expresses dissatisfaction with trial by judge. Jury trial is not perfect but the courts are not powerless to restrain unwarranted verdicts. They decide rules of evidence, lay the burden of proof and instruct the jury. New trials and remittiturs are available when the court finds the verdict to be completely unreasonable or shockingly unconscionable in amount. But, to approve of the judiciary totally depriving the plaintiff of his day in court save in those limited instances where he cannot recover under any construction

of the evidence is the opening blow to rip the substance away from the form. The public should not be deluded. This great institution should not be drained of vitality and left to stand as an empty facade.

In the final analysis, the tort law is much more than a fine drawn web of legal reasoning, it is the conscience of the community in action. Green, Tort Law: Public Law in Disguise 38 Tex. L. Rev. 1, 257, 269 (1960). Not only does it provide compensation for those damaged by another, it encourages motorists to buy insurance, railroads to build overpasses and store managers to keep banana peels off the floor. It is the function of the courts and the legislature to set standards of conduct and to delimit the field of liability. However, when one citizen is pitted against another in a courtroom, who is less apt to become subjected to the influence of vested interests, who is better qualified to speak for the entire community, who under our system of government reserving all undelegated powers to the people is the better party to weigh the question of whether there has been any deviation from the contemporary standards of fair and reasonable conduct?

The hardest restraint of all is self restraint. It is impossible for juries to usurp the functions of judges but the process of usurping the jury's function has gone far. Clause One of the Seventh Amendment may not be essential to ordered liberty. But Clause Two is the very heart of the system of trial by jury. We ask the interposition of the Supreme Court to stem the "gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway v. United States*, 319 U.S. 372, 397 (Dissenting opinion).

PRAYER

For the reasons given, your petitioners ask that this petition for a writ of certiorari be granted.

Respectfully submitted,

August 26, 1966

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APPENDIX

Note—Unless otherwise indicated, all emphasis has been supplied by petitioners.

Decisions of the Supreme Court Since 1868 Discussing Applicability of Seventh Amendment Guaranties to State Court Litigation

Note—this listing is submitted in support of petitioners' proposition that the applicability of Clause Two of the Seventh Amendment to state court litigation has never been directly and necessarily passed upon. The list is exhaustive and includes many cases where the discussion was very offhand. While many sources have been checked, primary reliance has been laid upon the Statute Edition of Shepard's United States Citator. That work also contains many citations discussing the application of the Seventh Amendment in the Federal courts which have been omitted. Numerous additional FELA cases brought up from state courts have also been omitted because there was no express discussion of the Seventh Amendment.

KEY (A)—Civil case originating in state court
(B)—Civil case originating in Federal court
(C)—Criminal case originating in state court
(D)—Case does NOT involve claim that court below re-examined facts tried by jury.
(E)—Case does involve claim that court below re-examined facts tried by jury.
(F)—Civil case in which petitioner claimed violation of 1st Clause, 7th Admt.; i.e., claimed state law unconstitutionally prohibited trial by jury in his case.
(G)—Case involving application of 7th Amdt. in territories and D.C.
(H)—Petitioner attacked state laws allowing majority verdicts or "bobtailed" juries.
(I)—FELA case
(J)—Statement in dissenting opinion
(K)—Statement in concurring opinion
(L)—Dicta

The Justices v. Murray, 76 U.S. 274. (A) (E) (L) Discussed in text.

Hornbuckle v. Toombs, 85 U.S. 648. (D) (G)

Edwards v. Elliot, 88 U.S. 532. (A) (D) (F) Discussed in text.

KEY (A)—Civil case originating in state court
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Insurance Co. v. Dunn, 86 U.S. 214. (A) Where state allows trial de novo as a matter of right, it does not violate 7th Amdt. for federal court to grant trial de novo after removal.

Walker v. Sauvinet, 92 U.S. 90, (A) (D) (F) Discussed in text.

Pearson v. Yewdall, 95 U.S. 294. (A) (D) (L)

Ex parte Virginia, 100 U.S. 339, 354. (C) (D) (J)

Missouri v. Lewis, 101 U.S. 22, 31-32, (A) (D) (L)

Hurtado v. California, 110 U.S. 516, 533. (C) (D) (F) Grand juries may be abolished.

L. & N. R. Co. v. Woodson, 134 U.S. 614. (A) (D) State statute prohibiting more than two new trials for insufficient evidence not unconstitutional.

Scott v. Neely, 140 U.S. 106, 109. (B) (D) (F) (L)

Cates v. Allen, 149 U.S. 451. (A) (D) (F)

Iowa Cent. R. Co. v. Iowa, 160 U.S. 389, 392. (A) (D) (L) The dicta stating that no constitutional issue is involved where jury trial is denied through erroneous interpretation of state law

must be considered as limited by the "mere error" rule. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673; *Thompson v. Louisville*, 362 U.S. 199.

Grayson v. Lynch, 163 U.S. 468, 475. (G)

Walker v. N. M. & S. P. R. Co., 165 U.S. 593. (G)

C. B. & Q. R. Co. v. Chicago, 166 U.S. 226. (A) (D) (L) Discussed in text.

American Pub. Co v. Fisher, 166 U.S. 464. (G)

Springville v. Thomas, 166 U.S. 707. (G) Discussed in text.

Wilson v. North Carolina, 169 U.S. 586, 595. (A) (D) (F)

Thompson v. Utah, 170 U.S. 343, 347. (C) (H)

Chappell v. Sulphur, 172 U.S. 472 (A) (D) (F) Statute regulating jury demand not unconstitutional.

Capital Traction Co. v. Hof, 174 U.S. 1. (E) (G) (L) Justice court in D.C. is not a common law court; 7th Amdt. does not prohibit trial *de novo*.

Maxwell v. Dow, 176 U.S. 581, 586, 598. (C) (H)

Chapin v. Fye, 179 U.S. 127. (A) (D) (L)

Smiley v. Kansas, 196 U.S. 447, 454. (A) (D)

Twining v. New Jersey, 211 U.S. 78, 98. (C) (D) (L)

Creswill v. Grand Lodge, 225 U.S. 246. (A) Verdict reversed by U.S. Supreme Court where no supporting evidence. Discussed in text.

Slocum v. New York Life Ins. Co., 228 U.S. 364. (B) (E) Held error to reverse without granting new trial.

Dill v. Ebey, 229 U.S. 199. (A) (D) (F)

Minneapolis & St. L. R. Co. v. Bombolis, 241 U.S. 211. (A) (D) (H) (I) Discussed in text.

St. L. & S. F. R. Co. v. Brown, 241 U.S. 223. (A) (D) (H) (I)

Chesapeake & O. R. Co. v. Carnahan, 241 U.S. 241. (A) (D) (H) (I)

Louisville & N. R. Co. v. Stewart, 241 U.S. 261. (A) (D) (H) (I)

St. L. & K. C. Land Co. v. Kansas City, 241 U.S. 419, 431. (A) (E) Discussed in text.

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Chesapeake & O. R. Co. v. Kelly, 241 U.S. 485. (A) (D) (H) (I)

Chesapeake & O. R. Co. v. Gainey, 241 U.S. 494. (A) (D) (H) (I)

New York Cent. R. Co. v. White, 243 U.S. 188, 208. (A) (D) (F) Workmen's Compensation[1]

Hawkins v. Bleakly, 243 U.S. 210, 216. (B) (D) (F) Workmen's Compensation. See footnote 1.

Mountain Timber Co. v. Washington, 243 U.S. 219, 235. (A) (D) (F) See footnote 1.

Wear v. Kansas, 245 U.S. 154. (A) (D) (F)

Chicago, R. I. & P. R. Co. v. Cole, 251 U.S. 54. (A) (D) (L) It is not unconstitutional to *enhance* the right of jury trial.

Chicago, R. I. & P. R. Co. v. Ward, 252 U.S. 18, 19. (A) (D) (H) (I)

Wagner Elec. Co. v. Lyndon, 262 U.S. 226. (A) (E) Discussed in text.

Southern R. Co. v. Durham, 266 U.S. 178. (A) (D) (F)

[1] Workmen's Compensation case. Compensation statutes have been upheld on the theory that they do away with the right of recovery entirely and nothing is left for the jury to try.

Van Oster v. Kansas, 272 U.S. 465. (A) (D) (F)

Dohany v. Rogers, 281 U.S. 362. (A) (D) (F)

Herron v. Southern Pac. Co., 283 U.S. 91. (B) (E) Federal court not bound by state provision enhancing jury trial; such is contrary to common law.

Crowell v. Benson, 285 U.S. 22. (B) (D) Longshoremen's and Harbor Worker's Compensation Act does not violate 7th Amdt. See footnote 1.

Brown v. Mississippi, 297 U.S. 278, 285. (C) (D) (L) Discussed in text.

Palko v. Connecticut, 302 U.S. 319, 324. (C) (D) (L)

United Gas Pub. Serv. Co. v. Texas, 303 U.S. 123, 151. (A) (D) (K) A state may extend the use of juries.

Bailey v. Cent. Vt. R. Co., 319 U.S. 350, 358. (A) (E) (I) (J) Verdict reinstated. Discussed in text.

Brady v. Southern R. Co., 320 U.S. 476, 479. (A) (E) (I) Discussed in text.

Malinski v. New York, 324 U.S. 401, 416. (C) (D) Discussed in text.

Adamson v. California, 332 U.S. 46, 78. (C) (D) (J)

Fay v. New York, 332 U.S. 261, 263. (C) (D) (K)

In re Oliver, 333 U.S. 257, 281. (C) (D) (K)

Bute v. Illinois, 333 U.S. 640, 651. (C) (D) (K)

Wilkerson v. McCarthy, 336 U.S. 53, 64. (A) (E) (I) (K) Directed verdict reversed.

Dice v. Akron, C. & Y. R. Co., 342 U.S. 359, 365. (A) (E) (I) Verdict reinstated. Discussed in text.

Kinsella v. Krueger, 351 U.S. 470, 475. (D) (F) (L) Criminal case originating in Federal Court. Upholds court martial of civilians abroad. Reversed on rehearing. *Reid v. Covert*, 354 U.S. 1. Discussed in text.

Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 508. (A) (E) (I) Verdict reinstated. Discussed in text.

Byrd v. Blue Ridge Co-op., 356 U.S. 525, 537. (B) (E) Jury trial of *all fact issues* required. Discussed in text.

Knapp v. Schweitzer, 357 U.S. 371, 379. (C) (D) (L)

KEY (A)—Civil case originating in state court
(B)—Civil case originating in Federal court
(C)—Criminal case originating in state court
(D)—Case does NOT involve claim that court below re-examined facts tried by jury.
(E)—Case does involve claim that court below re-examined facts tried by jury.
(F)—Civil case in which petitioner claimed violation of 1st Clause, 7th Admt.; i.e., claimed state law unconstitutionally prohibited trial by jury in his case.
(G)—Case involving application of 7th Amdt. in territories and D.C.
(H)—Petitioner attacked state laws allowing majority verdicts or "bobtailed" juries.
(I)—FELA case
(J)—Statement in dissenting opinion
(K)—Statement in concurring opinion
(L)—Dicta

Bartkus v. Illinois, 359 U.S. 121, 125. (C) (D) (L)

Dick v. New York Life Ins. Co., 359 U.S. 437, 455. (B) (E) (J) (L) Verdict reinstated. Discussed in text.

Magenau v. Aetna Freight Lines, 360 U.S. 273, 282. (B) (E) Jury trial of *all fact issues* required. Discussed in text.

Harris v. Penna. R. Co., 361 U.S. 15, 17. (A) (E) (I) (K) Verdict reinstated. Discussed in text.

Inman v. Baltimore & O. R. Co., 361 U.S. 138, 146. (A) (E) (I) (J) Rule against re-examination affirmed but no negligence found. Take-nothing judgment affirmed.

Gallick v. Baltimore & O. R. Co., 372 U.S. 108, 125. (A) (E) (I) (J) Verdict reinstated. Discussed in text.

Simler v. Conner, 372 U.S. 221, 222. (B) (D) Jury trial required.

Abington Sch. Dist. v. Schempp, 374 U.S. 203, 253. (A) (D) (K)

New York Times Co. v. Sullivan, 376 U.S. 254, 285. (A) Rule against re-examination affirmed but no evidence of malice found. Recovery denied.

Malloy v. Hogan, 378 U.S. 1, 4. (C) (D) (L)

TRIAL COURT PROCEEDINGS

Testimony of Daniel H. McMaster

Direct Examination By Mr. Howell:

"Q. Would you give your name and occupation to the jury, please? A. Daniel H. McMaster. I am a loan service representative, Veterans Administration. (Testimony 369)

* * * * *

"Q. What transpired when you called on Trout? A. * * * He then told me he was Moorman's employee and I asked him, as I recall, if he had any papers showing that he had title to the property and he gave me the deed.

"Q. Mr. McMaster, at this time, I will hand you Plaintiffs' Exhibit No. 3 and ask you if you have seen it before? A. Yes, this is the deed Trout gave to me that night. [See A-25, infra]

"Q. Thank you, sir. Mr. McMaster, I will ask you if you subsequently called on any other persons with reference to this transaction? A. I then called on Moorman * * * and I showed it to Moorman.

"Q. What were the discussions at that time? A. I asked him to look at the deed carefully and he could see where his name was on the deed and that had been erased and Trout's name had been written in. *He said he knew that* and then I asked him if he would—did he think that was fair to Sitton and would he make up the payments. He said he would not, that was Sitton's responsibility. (Testimony 371, 372)

* * * * *

"Q. (By Mr. Howell) Mr. McMaster, without going into what you said, tell me what Mr. Moorman said further out there that day as far as you can recall. A. Well, he said that was Moorman's—I mean Sitton's responsibility, that he washed his hands of it or something

to that effect. Then I asked him who changed the deed. [Objection overruled]

"Q. (By Mr. Howell) You asked him who had changed the deed, Mr. McMaster, and what was his reply? A. He told me that Mrs. Brown of the American Title Company had changed the deed.

"Q. What else was said in that meeting? A. I asked him then did he know that was wrong and he said then he would wash his hands of the matter, so I asked him where Mrs. Brown's office was and I proceeded to her office.

"Q. I see, and did you meet and talk with Mrs. Brown? A. I met Mrs. Brown, I showed her my Government identification and I asked her, showed her the deed and I asked her did she change that and she said she did. I then asked her was she in the habit of doing that. *As I recall she did that when it was necessary.*

"Q. That was her statement to you? A. Yes, but it might not have been in those words exactly. I wrote it down on the Government's sheet." (Testimony 373-375)

* * * * *

Cross Examination By Mr. Welch: (Testimony 380)

* * * * *

"Q. Well, now, you were assuming that he assumed the debt, weren't you? A. No, he told me he had.

"Q. Who told you he had? A. Moorman.

"Q. Moorman told you he assumed the debt? A. That he had Mrs. Brown take his name off of the deed and put Trout's on there.

"Q. But you just said that Moorman told you he had assumed the debt? A. Yes. He purchased the house from Sitton.

"Q. He told you he had purchased the house from Sitton? A. Yes.

"Q. He didn't tell you he had assumed the debt? A. Yes, and it is in the deed also, see, it is an assumed agreement to pay.

"Q. In your conversation with Moorman did Mr. Moorman say, 'I assumed the debt'? A. Well, now, since I don't have the record I would just say yes.

"Q. Do you remember him saying those words, 'I assumed the indebtedness'? A. Well, I remember him telling me about trading houses with Sitton. I believe they traded houses. Sitton assumed his house and he assumed Sitton's house, yes.

"Q. But Mr. Moorman didn't tell you that he assumed Sitton's indebtedness? A. Yes.

"Q. He simply said they just traded houses? A. No, he assumed the debt, each one assumed the debt. See, that is one of our questions each man we call on we ask him that point. (Testimony 382-383)

* * * * *

"Q. *And you are able to remember that Mrs. Brown told you that she changed the name on the deed?* A. *Certainly did, I was surprised. Yes. See, I am a notary also.* (Testimony 385)

* * * * *

"Q. Then what did you tell her? A. I then introduced myself as I do and I showed her the deed and I asked her if she knew Mr. Moorman and then showed her the change.

"Q. Did she say whether or not she knew Mr. Moorman? A. Yes, she did. (Testimony 391)

* * * * *

"Q. What were her exact words? A. Well, I don't recall that other than she told me she changed them and then I asked her something if she was in the habit of that and she said something that was in the order of

'when neecssary,' that was not her exact words. I wrote that on the report. (Testimony 391)

* * * * *

"Q. And are you sure that she said she changed it or that it was changed in this office? A. *No, she said she changed it.*

"Q. She said she changed it? A. That's right.

"Q. What were the words when she said she changed it? A. I don't know, that goes back to the report, I don't have the report. You asked me a statement and she told me she changed it.

"Q. You are here testifying from your own personal knowledge? A. That's right.

"Q. *You say she said she changed it?* A. *That's right.*" (Testimony 392)

* * * * *

Cross Examination By Mr. Rugh: (Testimony 401)

* * * * *

"Q. Now, Mr. McMaster, you stated previously, I believe, that it is your testimony that Mrs. Brown told you that she had changed the deed? A. At Moorman's request, yes.

"Q. Did she say why she had done this if she did so do it. A. No, our conversation that day was very brief.

"Q. Did she say that anyone had asked her to do this or that she did it pursuant to anyone's instructions? A. As I recall, *Moorman told me he had her do it and she told me she did it.*" (Testimony 403)

Testimony of Walter J. Moorman

Direct Examination By Mr. Howell:

"Q. Tell me the name of the people you dealt with over at the Duckworth Agency. A. I recall Mr. Harry

Summer's name there; there may have been others, I don't remember any others.

"Q. You dealt primarily with Mr. Summer? A. Yes, most of my dealings with them were by telephone and on occasion I might not have known who I was speaking to. Mr. Summer handled the personal transactions. (Testimony 91)

* * * * *

"Q. When did you advise Mr. Summer that you wanted to have W. R. Trout buy the house? [The Sittons' G.I. home on Andover which Moorman was taking in trade] A. I don't recall the date.

"Q. Well, how long would it have been after this July 14th? [date of initial sales contract, P's. Ex. 1, A-25, infra] A. I don't remember that.

"Q. Would it have been before September 7th? [date of execution of petitioners' G.I. deed, A-25] A. I don't recall dates.

"Q. Would it have been after September the 7th? A. I don't recall these dates. (Testimony 97)

* * * * *

"Q. When did the Sittons move? A. I don't know.

"Q. The house [on Pleasant Drive which the Sittons were buying from Moorman] was vacant, I believe, is that right, sir? A. Yes.

"Q. Did you give them permission to move in before you got your money? A. I don't think—no, sir.

"Q. Then this call you say you made to the title company which you can't remember the name of was made after the Sittons had signed this September 7th deed, is that right, sir? * * * [objection overruled] A. I don't know when the call was made as to dates.

"Q. (By Mr. Howell) But you have testified that you imagined it was made after they moved, the Sittons

moved into your house? A. I don't know when they—I don't know when they moved. (Testimony 100-101)

* * * * *

"Q. When did it come to your attention, if it ever did, this loan was in trouble? MR. VANCE: We object. A. I don't remember exactly the fact I ever found it in trouble. * * * [objection overruled]

"Q. (By Mr. Howell) I will ask you, sir, if you received any telephone calls from Mrs. Sitton regarding this loan? A. I don't recall that.

"Q. No recollection whatsoever? A. Not as of the conversation, no, sir.

"Q. Well, do you recall the event? A. I don't really remember it, no, sir.

"Q. After you became advised that this loan was in trouble what did you do? A. In regard to what?

"Q. In regard to the Sittons' GI loan? A. Nothing.

"Q. Nothing at all? A. No, sir. (Testimony 106-107)

* * * * *

Deposition Testimony—Questions By Mr. Howell:

"Q. Whose idea was it to have the deed run straight from the Sittons to Trout? A. Mine.

"Q. When did you first get this idea? A. As soon as Mr. Trout indicated that he and his wife were interested and liked the house and would buy it. (Testimony 98, 99)

* * * * *

"Q. Was that before or after Mr. and Mrs. Sitton moved, * * * A. I don't remember that. *I imagine it was after*, but I am not certain. (Testimony 99)

* * * * *

"Q. Had you ever done any business with Harry Summer or the Duckworth Agency before? A. I don't think so.

"Q. Have you done any business with them since? A. Yes, sir, I have.

"Q. And what agent or associates of Duckworth Agency have you dealt with there primarily? A. The same gentlemen.

"Q. Harry Summer? A. Yes, sir. (Testimony 417)

* * * * *

"Q. When did you receive word that the Sittons' loan had gone through and that the real estate deal between you and them was to be closed? A. I don't recall.

"Q. Who did you get that advice from? A. I would assume Mr. Summer phoned me when it was completed with the Duckworth Agency. (Testimony 420-421)

* * * * *

"Q. When you went over to the title company to sign the papers, who did you see? A. I don't know that.

"Q. Was it a man or lady at the title company official [sic]? A. I think it was a man, I am not certain of that.

"Q. Did you get a check from the title company while you were there? A. I don't remember that.

"Q. Did you turn the keys to the property over to the Sittons in person? A. I don't remember.

"Q. When did you get the keys to the house on Andover? A. I don't remember that.

"Q. Did you ever get them? A. I don't know.

"Q. Did you ever tell Mr. Summer that you were going to have the deed made straight from the Sittons to Trout? A. I don't remember telling him that. (Testimony 421, 422)

* * * * *

"Q. You don't know whether you ever told Mr. Summer about the matter or not? A. That's correct. (Testimony 423)

* * * * *

"Q. Did you ever tell him? A. I don't recall telling him. (Testimony 423)

* * * * *

"Q. Mr. Moorman, I am going to hand you Plaintiffs' Exhibit 1 [the petitioners' G.I. deed; later re-marked as Ps' Ex. 3] and ask you if you have ever seen that instrument before? A. *I couldn't tell you if I have seen it or not.* (Testimony 424)

* * * * *

"Q. Do you know Mrs. Brown at the American Title Company office in Casa Linda. A. No, sir.

"Q. You did go to Casa Linda office, didn't you? A. I am not sure. I had in mind that I had gone over on Scyene Road.

"Q. Was Plaintiffs' Exhibit 1 shown to you on the day you signed the papers? A. I don't know that. (Testimony 424, 425)

* * * * *

"Q. How many times did you go to the office of American Title Company? Any office of American Title Company with reference to this Sitton deal? A. I don't remember that. (Testimony 425)

* * * * *

"Q. You made at least one telephone call over there? A. Yes, sir.

"Q. You are sure you made at least one? A. Yes, sir.

"Q. Do you know whether you made any more? A. I don't know.

"Q. Do you know whom you talked to at the title company on those telephone calls? A. No.

"Q. Man or woman? A. I don't know.

"Q. Did you ever call the Sittons and ask their permission to make a sale direct from them to Trout? A. No, sir. (Testimony 426)

* * * * *

"Q. Before you made a trade with Mr. Trout what did you do to find out whether or not he was financially responsible? A. Nothing. (Testimony 426-427)

* * * * *

"Q. Have you talked to Mrs. Sitton at any other times on the phone? A. It seems to me she called me one time, I am not certain. (Testimony 429)

* * * * *

"Q. *Did you ever tell Harry Summer what you were going to do with the Andover property after you took it in trade?* A. *I am sure Mr. Summer knows,* I don't remember specifically telling him, no, sir.

"Q. Where does W. R. Trout work now? A. He works for me. (Testimony 429)

* * * * *

"Q. Well, after you learned that he had moved out, what did you do to him? A. What did I do to him?

"Q. Yes. A. Nothing. What do you mean, what did I do to him? (Testimony 430)

* * * * *

"Q. Did you bawl him out? A. No, sir.

"Q. Have you ever tried to get him to pay up the deficiency on this GI loan? A. No, I haven't.

"Q. Did you ever ask him to? A. No.

"Q. Did you ever offer to take it out of his wages and work it out? A. No.

"Q. Did you ever offer to fire him unless he did something to get this thing straightened up? A. I did not.

"MR. HOWELL: That's all I have."

"Q. (By Mr. Newberry) *His financial condition is his business, isn't it?* THE WITNESS: *That's right.*

"MR. NEWBERRY: And it is not yours? THE WITNESS: That's correct. (Testimony 430-431)

Testimony of William Robert Trout

Direct Examination By Mr. Howell:

"Q. How long have you been employed by Moorman Brothers Plumbing Company? A. Eight years.

"Q. Still working there? A. Yes.

"Q. State the facts as to how you happened to move to this address on Andover. A. Well, I had spoke to Mr. Moorman about buying his house on Pleasant Drive and he taken this house on Andover in trade in it and he asked if I would be interested in buying it.

"Q. Did you buy it from Mr. Moorman? A. Yes, sir.

"Q. Did you go out and look at it first? A. Yes, sir.

"Q. State the facts as to who went along with you, if anyone. A. Well, the first time I went, Mr. Moorman and myself.

"Q. Was the house occupied or vacant on that trip? A. It was vacant.

"Q. How did you get the key? A. I went to Mr. Sitton's house myself and got it.

"Q. Where were the Sittons living at that time? A. On Pleasant Drive.

"Q. *That is the first time you saw the house on Andover, the Sittons had already moved?* A. *Yes, sir.* (Testimony 123, 124)

* * * * *

"Q. Going back to April of 1962, about four or five months before you moved into this house on Pleasant Drive,—excuse me, before you moved into this house on

Andover, Mr. Trout, did you apply for a loan, mortgage loan in your own name? A. I did.

"Q. What was the result of that application? A. It was turned down.

"Q. Mr. Moorman know of that? A. No, he didn't.

"Q. Did you advise him of that at the time you were dealing with him? A. No, I didn't.

"Q. On the Andover house? A. No, sir.

"Q. Did he ask you? A. No, sir.

"Q. Did he ask you anything about your credit or financial standing at the time he sold you the house on Andover? A. I don't remember. (Testimony 130)

* * * * *

"Q. (By Mr. Howell) When did Mr. Moorman make any mention to you about your moving out of the house? [objection overruled with qualification] A. It was about approximately two months, I guess, or maybe not quite so long.

"Q. About two months after you had moved out? A. Yes. (Testimony 133)

* * * * *

"Q. Did Mr. Moorman offer to help you through your financial difficulties so you could save the house? A. I didn't ask for help.

"Q. And he didn't offer. A. He didn't know I had moved until two months later.

"Q. Did Mr. Moorman tell you that you should pay any mortgage deficiencies or order you to? A. No. (Testimony 135)

Testimony of Kathryn H. Brown

Direct Examination By Mr. Howell:

"Q. Mrs. Brown, can you tell the jury how the name Walter Moorman got erased out of this deed and the

name of W. R. Trout and wife, Joanne Trout, got inserted? A. As far as knowing how it got changed, no. I understand Mr. Moorman called our office and asked us to—

THE COURT: Just a minute, what you know tell us, but not what you have heard. We want your knowledge.
THE WITNESS: I have no recollection of it being changed.

"Q. (By Mr. Howell) None whatsoever? A. None whatsoever.

"Q. Do you have any recollection of the Sittons coming in to sign? A. No, I do not. (Testimony 54)

* * * * *

"Q. (By Mr. Howell) Mrs. Brown, I will hand you what has been marked as Plaintiffs' Exhibit No. 5 and ask you to tell me what that is. A. It is a copy of the purchaser's statement wherein Sitton purchased from Moormans.

"Q. Sitton purchased from whom, ma'am? A. Moorman. (Testimony 58)

* * * * *

"Q. You have any copies of any statements from Moorman to Trout? A. I had no dealings with Mr. Trout.

"Q. Has he ever been in your office? A. No, he has not. (Testimony 59)

* * * * *

"Q. Mrs. Brown, can you explain why that the Sittons came in your office on September the 7th and signed the papers and you took their notarial acknowledgement on that date, why their deed did not get to the County Clerk's office until September 21st. A. Well, there could be several reasons. (Testimony 69)

* * * * *

"Q. (By Mr. Howell) Mrs. Brown, that deed was altered sometime between September the 7th and September the 21st when it finally got down here to the County Clerk's office for recording, isn't that correct? A. It was altered sometime prior to it having been signed on September 7th.

"Q. What do you base—how do you base your conclusion, Mrs. Brown? A. Deeds are not altered after they have been signed.

"Q. These nine erasures that were made were made before the Sittons signed, is that your testimony? A. Yes.

"Q. That is your direct recollection, you remember that, Mrs. Brown? A. I do not remember the Sittons being in the office but I do not change the instrument after it has been signed and acknowledged. (Testimony 70-71)

* * * * *

"Q. That is a mighty long delay getting an instrument down to the courthouse, isn't it, Mrs. Brown? A. No, it isn't long at all. (Testimony 71)

* * * * *

"Q. Mrs. Brown, you told me you don't remember the Sittons coming in at all. Do you recognize the Sittons? A. No, I do not. I do not remember ever seeing them before.

"Q. All right, ma'am. Do you directly recall Mr. Moorman coming into your office? A. I do not.

"Q. Do you recognize Mr. Moorman sitting here in the courtroom? A. As having seen him before, no. (Testimony 72-73)

* * * * *

"Q. *You have handled quite a bit of business with Mr. Summer, haven't you?* A. *Yes, I have.* (Testimony 73)

* * * * *

"Q. You are talking to him all the time, aren't you? A. On his deals, yes.

"Q. *And you were talking to him frequently during August and September, 1962?* A. *I feel that we were.* (Testimony 74)

* * * * *

"Q. Where did you get the additional information necessary to prepare Plaintiffs' Exhibit No. 3? [Petitioners' deed] A. We usually—in fact, always request the agent or whoever is handling the transaction to secure * * * something to work from in preparing the deed.

"Q. That would be Mr. Summer in this case, is that right? A. *Mr. Summer or some representative* of his.

"Q. And they sent you the additional information necessary for the preparation of this deed, Plaintiffs' Exhibit No. 3? A. Yes, we were furnished the title policy issued to Mr. Sitton." (Our emphasis) (Testimony 77-78)

* * * * *

"Q. (By Mr. Howell) Do you directly recall Mr. Moorman making such a telephone — — * * * [objection overruled] THE WITNESS: I do not remember handling this transaction at all. (Testimony 79)

* * * * *

"Q. Your testimony now is that you do not remember or recall any such transaction, is that right? A. No, I do not remember closing this particular transaction.

"Q. The statement you made in your affidavit is not correct? [Ps' Ex. 11, See Below] A. The statement I made in my affidavit I suppose you would say is from the way things would have to happen. (Testimony 82-83)

Deposition Testimony—Questions By Mr. Howell:

"Q. Do you know what secretary or typist made those erasures? A. No.

"Q. Were they made in the office out there at 114 Casa Linda Plaza? A. I do not know, looks like it was and I feel sure it must have been.

"Q. Is it your practice to take acknowledgment on instruments containing substantial erasures and retyping? A. Yes, as long as they signed it in your presence. (Testimony 414)

* * * * *

"Q. You erase things out and type in different provisions? A. Not after it is signed but before it is signed; yes.

"Q. It is a standard practice out there? A. It is a standard practice anywhere." (Testimony 414-415)

Mrs. Brown's Affidavit in Support of Motion for Summary Judgment

(Ps' Ex. 11, Exhibit Vol.)

"ON THIS the 18th day of AUGUST, 1964, personally appeared before me KATHERINE H. BROWN, who after first being duly sworn, deposed and stated as follows:

* * * * *

III

That at some time prior to the execution of the papers by RUSSELL H. SITTON and wife, BARBARA SITTON on September 7, 1962, MOORMAN called the

Casa Linda office of American Title Company of Dallas, and ordered the Deed from the SITTONS drawn so that the SITTON conveyance would be to W. R. TROUT.
* * *

IV

* * * She does not know of any person who could have made any alterations in such Deed, since *the Deed was in her custody and possession* from the date of signing and notarizing such Deed until such Deed was forwarded to the main office of American Title Company of Dallas to be forwarded to the County Clerk to be placed of record."

Testimony of Harry Clifton Summer, Jr.,

Direct Examination By Mr. Howell:

"Q. Now, after the Sittons signed all five copies of this contract [Ps.' Ex. I, A-25]—they did sign that morning, is that right? A. * * * they signed five copies, yes. (Testimony 20)

* * * * *

"Q. You kept all five copies, is that right, sir? A. That's right. (Testimony 20)

* * * * *

"Q. The selling agent is who? A. Mrs. Gardner. (Testimony 21)

* * * * *

"Q. Is she going to be down here to testify? A. I don't know whether she is or not. (Testimony 21)

* * * * *

"Q. *The contract doesn't say a word about the GI loan at all, does it?* A. *It does not.* (Testimony 27)

* * * * *

"Q. And why didn't you, Mr. Summer, write in the contract here that Mr. Moorman was or was not to

assume the mortgage? A. *I have never written that in contracts.* (Testimony 28)

* * * * *

"Q. It is your considered testimony that you never put a provision in a contract spelling out definitely whether or not the buyer is going to assume the outstanding mortgage or take the house without assuming the mortgage? A. In a trade we write the contract just exactly like it is written.

"Q. Without providing or making any reference whatever to the fact one piece of property has got a mortgage on it? A. That would come up later.

"Q. Let the chips fall where they may? A. That would come up later in your negotiations. (Testimony 28, 29)

* * * * *

"A. *We close practically all of our deals with American Title.* * * * (Testimony 41)

Deposition Testimony—Questions By Mr. Howell:

"A. The only discussions that I had with Mrs. Brown regarding this deal was at the time the Veterans Administration man came to her office. (Testimony 441)

* * * * *

"A. She just notified me and told me that the Veterans Administration man had been to her office in regard to the Moorman and Sittons' deal, that's all." (Testimony 441)

Testimony of Mrs. Barbara Sitton

[Concerning events taking place soon after petitioners began receiving notices and demands on their G.I. loan]

Direct Examination By Mr. Howell:

"Q. And what did you do? A. I made some calls.

"Q. And who did you call? A. I first called Mr. Summer. (Testimony 191)

* * * * *

"Q. State the nature of your discussions with Mr. Summer. A. Yes, sir, I told Mr. Summer our GI loan was in trouble, that I gave him the whole nature of it, all the calls and letters and Mr. Summer told me there wasn't anything I could do about it, I had signed an open deed.

"Q. Did you know what an open deed was? A. No, sir.

"Q. Did you make any other telephone calls? A. Yes, sir.

"Q. Who did you call? A. I called Mr. Moorman. (Testimony 191, 192)

* * * * *

"Q. What were your discussions with Mr. Moorman? [objection overruled] A. I asked Mr. Moorman did he feel any responsibility towards this loan and he said that he did not. * * * (Testimony (192-193)

* * * * *

"Q. How did that conversation with Mr. Moorman end? A. Mr. Moorman told me I had signed an open deed and hung up on me.

"Q. Did you have any further conversations? A. Yes, I called Mrs. Brown about it.

"Q. And what did Mrs. Brown say? A. She said signing an open deed was a common procedure of the title company.

"Q. And what did she say with respect to your deed? A. She said there wasn't anything we could do about any of this.

"Q. Did she make any statement as to what kind of a deed you had signed? A. I don't think so, no. As I recall, Mrs. Brown said that I signed an open deed." (Testimony 194)

WARRANTY DEED — Vend Lien

24287..$2.00

The State of Texas, } **Know All Men by These presents:**
County of DALLAS }

That BARBARA SITTON RUSSELL HAROLD SITTON and wife,

of the County of DALLAS State of TEXAS for and in consideration of the sum of TEN AND NO/100 CASH and other good and valuable consideration Dollars to us in hand paid, and secured to be paid, by W. R. TROUT and wife, JOANNE TROUT as follows:

the receipt of which is hereby fully acknowledged; and

THE FURTHER CONSIDERATION of the ASSUMPTION OF AND AGREEMENT TO PAY by the Grantee herein of the unpaid balance due and owing on one certain note dated September 13, 1960, executed by Russell Harold Sitton and wife, Barbara Sitton, and payable to the order of T.J. BETTES COMPANY, as therein provided, in the original principal sum of $10,450.00; said note being secured by vendor's lien retained in deed of even date therewith and by deed of trust of even date therewith to John F. Austin, Jr., Trustee; and recorded in Deed of Trust Records of Dallas County, Texas;

(to which instruments reference is here made for all the terms, conditions and stipulations therein contained, which the Grantee herein agrees to perform;).

have Granted, Sold and Conveyed, and by these presents do Grant, Sell and Convey, unto the said W. R. TROUT and wife, JOANNE TROUT,

of the County of Dallas State of Texas all that certain lot, tract or parcel of land situated in Dallas County, Texas and being

LOT 11 in BLOCK "O" of ROLLINGWOOD HILLS ADDITION, an Addition to the City of Mesquite, Texas, according to the Map thereof recorded in Volume 22, Page 229, of the Map Records of Dallas County, Texas.

GRANTEES herein assume payment of taxes for the year 1962.

This conveyance is made and accepted subject to the restrictive covenants imposed against the hereinabove described real property as the same appear of record in the office of the county clerk of Dallas County, Texas.

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TO HAVE AND TO HOLD the above described premises, together with all and singular the rights and appurtenances thereto in any wise belonging unto the said

W. R. TROUT and wife, JOANNE TROUT, their

heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators, to WARRANT AND FOREVER DEFEND, all and singular the said premises unto the said

W. R. TROUT and wife, JOANNE TROUT, their

heirs and assigns, against every person whomsoever lawfully claiming, or to claim the same or any part thereof.

But it is expressly agreed and stipulated that the Vendor's Lien is retained against the above described property, premises and improvements, until the above described note , and all interest thereon, are fully paid according to its face and tenor, effect and reading, when this deed shall become absolute.

EXECUTED this 7th day of September , A.D. 19 62.

Russell Harold Sitton
Russell Harold Sitton

Barbara Sitton
Barbara Sitton

251—CONTRACT OF SALE AND RECEIPT OF EARNEST MONEY P-1/R&U TEXAS STANDARD FORM

The State of Texas, } By This Agreement and Contract,

County of DALLAS

Walter J. Moorman & wife, hereinafter called Seller,

acting through the undersigned and duly authorized Agent, hereby sells and agrees to convey unto

Russell Harold Sitton & wife Barbara J. hereinafter called Purchaser,

the following described property: Lying and situated in the County of Dallas, State of Texas.

Being known as Lot 8 Block B/6185 Grove Mound Addition to the City of Dallas, Texas.
Also known as 2219 Pleasant Drive, Dallas, Texas

The purchase price is $ 11,500.00 payable as follows:

$ Cash (of which Purchaser has deposited with the undersigned Agent $ as part payment, receipt of which is hereby acknowledged by said Agent);

Purchaser agrees to make application for F.H.A. loan in amount 11,150.00, (30) years.
Balance as follows: Seller agrees to take in trade purchaser's home located at 331 Andover Drive, Mesquite, Texas, Allowing purchaser credit for all down payment and closing costs in amount not to exceed $700.00

The said executed note to be secured by Vendor's Lien and Deed of Trust with power of sale and with the usual covenants as to taxes, insurance, and default.

Seller agrees to furnish Title Policy to said property which shall be conveyed free and clear of any and all encumbrances except those named herein.

Purchaser agrees, within ten days from the receipt of said abstract, either to accept the title as shown by said abstract or to return it to the undersigned Agent with the written objections to the title. If said abstract is not returned to the Agent with the written objections noted within the time specified, it shall be construed as an acceptance of said title.

If any title objections are made, then the Seller or the Agent shall have a reasonable time to cure said objections and show good and marketable title. In the event of failure to furnish good and marketable title, the purchase money hereby receipted for is to be returned to Purchaser upon the cancellation and return of this contract; or, Purchaser may enforce specific performance of same.

Seller agrees, when title objections have been cured, to deliver a good and sufficient General Warranty Deed properly conveying said property to said Purchaser, and Purchaser agrees, when said Deed is presented, to pay the balance of the cash payment and execute the note and Deed of Trust herein provided for. Should the purchaser fail to consummate this contract as specified for any reason, except title defects, Seller shall have the right to retain said cash deposit as liquidated damages for the breach of this contract, and shall pay to Agent therefrom the usual commission, or, Seller may enforce specific performance of this contract.

Taxes for the current year, and current rents, insurance, interest (if any) are to be prorated to date of closing.

Possession on closing deal at Title Company.

Executed in triplicate this 14th day of July 19 62

This contract subject to the acceptance of Seller.

Accepted:

Walter Moorman
Seller.

By Thelma Gardner MS

Agent for Leonard Duckworth Agency

Russell H. Sitton
Barbara J. Sitton
Purchaser.

The Odes Company, Publishers, Dallas

Charge of the Court and Verdict of the Jury

[Note—numerous instructions and definitions are omitted]

You are the exclusive judges of the facts proved, the truthfulness and credibility of the witnesses, and the weight to be given their testimony.

1. Do you find from a preponderance of the evidence that the names of Walter J. Moorman and wife, Jeirenne Moorman, as Grantees were erased from the deed involved in this case dated September 7, 1962, after it was signed by the Plaintiffs, Russell Harold Sitton and wife, Barbara Sitton? A. *Yes*

2. Do you find from a preponderance of the evidence that such alteration, if any, of the Plaintiffs' deed was done pursuant to any conspiracy? A civil conspiracy is a combination or agreement of two or more persons, by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means. A. *Yes*

3. Find from a preponderance of the evidence which, if any, of the following named persons, if any, were parties to the conspiracy, if any, to alter the said deed (Plaintiffs' Exhibit No. 3), if you have so found.

KATHERINE H. BROWN	*Yes*
HARRY CLIFTON SUMMER, JR.	*Yes*
WALTER J. MOORMAN	*Yes*

4. Do you find from a preponderance of the evidence that at the time of the aforesaid conspiracy, if any, the Defendant Katherine H. Brown was employed by the Defendant American Title Company in a managerial capacity? A. *Yes*

5. Do you find from a preponderance of the evidence that in conspiring to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, the defendant Katherine H. Brown was acting within the course and scope of her em-

ployment, if any, for Defendant American Title Company of Dallas? A. *Yes*

6. Do you find from a preponderance of the evidence that at the time of the aforesaid conspiracy, if any, the Defendant Harry Clifton Summer, Jr. was employed by the Pleasant Grove office of the Leonard Duckworth Agency in a managerial capacity? A. *Yes*

7. Do you find from a preponderance of the evidence that in conspiring to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, the Defendant Harry Clifton Summer, Jr. was acting within the course and scope of his employment, if any, for the Pleasant Grove office of Leonard Duckworth Agency? A. *Yes*

8. Do you find from a preponderance of the evidence that in conspiring to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, the Defendant Harry Clifton Summer, Jr. was engaged in the conduct of the real estate business? A. *Yes*

9. Do you find from a preponderance of the evidence that at the time of the said conspiracy, if any, the Defandant Lawyers Surety Corporation was acting as surety upon a Real Estate Brokers Bond of the Defendant Harry Clifton Summer, Jr.? A. *Yes*

10. Do you find from a preponderance of the evidence, that at the time of the aforesaid conspiracy, if any, the Defendant Leonard Cooksey Duckworth was engaged in the conduct of the real estate business under the name of Leonard Duckworth Agency? A. *Yes*

11. Do you find from a preponderance of the evidence that at the time of the said conspiracy, if any, the Defendant Trinity Universal Insurance Company was acting as surety upon a Real Estate Brokers Bond of the Defendant Leonard Cooksey Duckworth? A. *Yes*

12. Do you find from a preponderance of the evidence that the parties, if any, to the aforesaid conspiracy, if any, in causing the alteration of Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, acted with reckless disregard for the mental and physical health and welfare of the Plaintiff, Russell Harold Sitton? A. *Yes*

13. Do you find from a preponderance of the evidence that the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, was a proximate cause of any mental or emotional pain and physical illness of Russell Harold Sitton occurring after July 1, 1963? A. *Yes*

14. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Russell Harold Sitton for his mental and physical pain and suffering, if any, after July 1, 1963, resulting from the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found? A. $30,000

15. Do you find from a preponderance of the evidence that the parties, if any, to the aforesaid conspiracy, if any, in causing the alteration of the Plaintiffs' deed (Plaintiff's Exhibit No. 3), if you have so found, acted with reckless disregard for the mental and physical health and welfare of the Plaintiff, Mrs. Barbara Sitton? A. *Yes*

16. Do you find from a preponderance of the evidence that the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, was a proximate cause of any mental or emotional pain and physical illness of Mrs. Barbara Sitton occurring after July 1, 1963? A. *Yes*

17. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Mrs. Barbara Sitton for her

mental and physical pain and suffering, if any, after July 1, 1963, resulting from the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found? A. $10,000.00

21. Find from a preponderance of the evidence which, if any, of the following named persons acted with malice in conspiring to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found? The term "malice" means ill will against a person, but in its legal sense means a wrongful act, done intentionally, without just cause or excuse.

KATHERINE H. BROWN	*Yes*
HARRY CLIFTON SUMMER, JR.	*Yes*
WALTER J. MOORMAN	*Yes*

22. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence should be paid as exemplary damages (as that term is defined for you in this charge), if any, by the following named parties?

AMERICAN TITLE COMPANY	$20,000.00
KATHERINE H. BROWN	$ 3,500.00

23. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence should be paid as exemplary damages (as that term is defined for you in this charge), if any, by the following named parties.

HARRY CLIFTON SUMMER, JR.	$ 3,500.00
LEONARD COOKSEY DUCKWORTH	$20,000.00

24. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence should be paid as exemplary damages (as that term is defined for you in this charge), if any, by Walter J. Moorman? A. $3,500.00

You are the sole judges of the facts proved; the credibility of the witnesses and of the weight and credit to be given to their testimony, but the law you will receive from the court,

which is herein given you and be governed thereby. (Pleadings 148-158)

Issues Requested by Plaintiff and Refused by Court

18. Do you find from a preponderance of the evidence that the parties, if any, to the aforesaid conspiracy, if any, in causing the alteration of Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, acted with reckless disregard for Russell Harold Sitton's G.I. loan obligation?

19. Do you find from a preponderance of the evidence that the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, was a proximate cause of a foreclosure and resulting mortgage deficiency?

19A. What sum of money, if any, do you find from a preponderance of the evidence has the Plaintiff Russell Harold Sitton been required to pay upon the aforesaid mortgage deficiency, if any, up to this date?

20. What sum of money, if any, do you find from a preponderance of the evidence will the Plaintiff Russell Harold Sitton be reasonably and probably required to pay upon the aforesaid mortgage deficiency, if any, in the future? (Pleadings 213-214, 228)

Final Judgment

On the 16th day of November, 1964, there came on to be heard before the Court pursuant to notice the above numbered and entitled cause wherein RUSSELL H. SITTON and his wife BARBARA J. SITTON are plaintiffs and AMERICAN TITLE COMPANY OF DALLAS, a corporation, KATHERINE H. BROWN, JARVIS L. BROWN, LEONARD COOKSEY DUCKWORTH, doing business as LEONARD DUCKWORTH AGENCY, TRINITY UNIVERSAL INSURANCE COMPANY, a corporation, HARRY CLIFTON SUMMER, JR., LAWYERS SURETY

CORPORATION and MR. AND MRS. WALTER J. MOORMAN are each of them defendants. Came the parties except LEONARD COOKSEY DUCKWORTH in person and came each of the parties hereto by their attorneys. And the plaintiffs having filed their Second Amended Original Petition and the parties having announced ready, this cause came on for trial before a jury duly selected, sworn and empanelled. And the plaintiffs, having adduced their evidence and having duly rested, and the said defendants and each of them having dictated and filed their respective motions for a directed or instructed verdict and the Court having heard and considered the same outside the presence of the jury, the said motions were each overruled, to which said defendants each duly excepted. And the defendants having each duly adduced their evidence and having duly rested and the jury having been charged in accordance with the law, came the jury on the 20th day of November, 1964 and returned its SPECIAL ISSUE VERDICT into open Court which reads as follows, to-wit:

[Verdict Omitted—See Above]

The said SPECIAL ISSUE VERDICT being duly endorsed:

WE, THE JURY, HAVE ANSWERED THE ABOVE AND FOREGOING QUESTIONS AS IS HEREIN INDICATED AND HEREWITH RETURN SAME INTO COURT AS OUR VERDICT.

James W. Bush,
Foreman

And the said Special Issue Verdict, having been examined by the Court and having been found to be the unanimous verdict of the jury, was ordered received and filed in this cause.

And the Plaintiffs having filed their motion for judgment and the defendants having each filed their respective motions

for judgment non obstante veredicto and the Court having on the 14th day of January, 1965 heard and considered each of the said motions and having reconsidered the motions for directed or instructed verdict aforesaid and having examined the pleadings and the verdict of the jury and having heard the argument of the parties is of the opinion that ~~the act of defendants in agreeing to alter and in altering the plaintiffs' deed after it was signed by the plaintiffs~~ J.C.H./s/ ~~RUSSELL HAROLD SITTON and BARBARA SITTON constituted damnum absque injuria and being of the opinion~~ [sic] that defendants are entitled to judgment as a matter of law; now, WHEREFORE, premises considered, IT IS ORDERED, ADJUDGED and DECREED that the Defendants AMERICAN TITLE COMPANY OF DALLAS, a corporation, KATHERINE H. BROWN, JARVIS L. BROWN, LEONARD COOKSEY DUCKWORTH, doing business as LEONARD DUCKWORTH AGENCY, TRINITY UNIVERSAL INSURANCE COMPANY, a corporation, HARRY CLIFTON SUMMER, JR., LAWYERS SURETY CORPORATION and MR. AND MRS. WALTER J. MOORMAN have and recover judgment non obstante veredicto and that the Plaintiffs RUSSELL H. SITTON and wife, BARBARA J. SITTON take nothing of these defendants by their suit and that all costs incurred herein be taxed against the plaintiffs.

IT IS FURTHER ORDERED that this judgment is final and all relief not specifically allowed herein or heretofore, is hereby denied.

To which order and judgment of the Court the plaintiffs RUSSELL H. SITTON AND BARBARA J. SITTON duly excepted and in open court gave notice of appeal to the Court of Civil Appeals for the 5th Supreme Judicial District of Texas sitting at Dallas, Texas.

SIGNED this 21 day of January, 1965. (Pleadings 218-227)

PROCEEDINGS IN THE COURT OF CIVIL APPEALS

Appellants' Points of Error
(filed August 25, 1965)

Point One: The Trial Court erred in holding that there was no evidence to support the jury's finding that plaintiffs' deed was altered after the execution thereof.

Point Two: None of the appellees had any right to perform, or agree to perform, the criminal act of altering plaintiffs' deed after the execution thereof. The Trial Court erred in denying judgment for personal injuries and for foreclosure deficiencies paid and for foreclosure deficiencies payable and for exemplary damages, or for nominal damages and costs, or for any damages whatsoever, on grounds that the alteration after execution did not infringe any legally protected right of the appellants.

Point Three: The Trial Court erred in holding that plaintiffs' cause of action is within the statute of frauds.

Point Four: The Trial Court erred in holding that there was no evidence to support any of the jury's findings that plaintiffs' deed was altered as the result of a conspiracy between appellees Summer, Brown and Moorman, or any of them.

Point Five: The Trial Court erred in holding that as a matter of law the conduct of appellees Summer, Brown, and Moorman (or any of them) in agreeing to alter the plaintiffs' deed after its execution did not constitute a conspiracy.

Point Six: The Trial Court erred in holding that the plaintiffs' deed was drawn or altered (or both) by an independent practicing attorney. On the contrary, the acts of the attorney involved and the alleged secretary for the said attorney were the acts of the defendant title company as a matter of law.

Point Seven: The Trial Court erred in holding that the law of proximate cause was applicable to appellants' causes of action for personal injuries and for foreclosure deficiencies

paid and for foreclosure deficiencies payable and for exemplary damages or to appellants' causes of action for any of the said damages.

Point Eight: Alternatively, the Trial Court erred in holding that there was no evidence from which the jury could conclude that the conduct of the defendants in altering and agreeing to alter plaintiffs' deed after the execution thereof was a proximate cause of appellants' personal injuries or of the foreclosure deficiencies paid or of the foreclosure deficiencies payable or of any of the said damages.

Point Nine: The Trial Court erred in holding that there was no evidence to support any of the jury's findings to the effect that appellee Summer, Brown and Moorman (or any of them) acted with malice.

Point Ten: Appellants are further entitled to recover exemplary damages because they were injured by the unlawful conduct of appellee title company and its alter ego, appellee Brown, engaging in the unauthorized practice of law; Article 9.01 of the Insurance Code being unconstitutional and void insofar as it provides that title companies may supervise signing of legal instruments, deliver instruments and close deals.

Point Eleven: [Amended] The Trial Court erred in refusing appellants' requested issues 18, 19, 19-A, and 20 regarding the foreclosure deficiency and in refusing Barbara Sitton's testimony with respect to payments thereon.

Point Twelve: [Amended] Alternatively, the amount of the foreclosure deficiency is reasonably fixed and uncontroverted and the payments made thereon by appellants is also uncontroverted. The Trial Court erred in failing to render judgment for foreclosure deficiencies paid and payable and this Court should enter judgment therefor to avoid the burdens of time and expense involved in a remand.

Point Thirteen: The act of the Trial Court in rendering judgment non obstante veredicto on grounds other than those

specifically set forth in written motions filed with the Court and served upon appellants was contrary to the laws of procedure and constituted denial of due process of law and equal protection of the law under Article One, Sections Fifteen and Nineteen of the Texas Constitution and Amendments Seven and Fourteen of the United States Constitution.

Point Fourteen: Inasmuch as there is evidence of probative force to support the jury verdict, it would have constituted denial of due process of law and equal protection of law under Article One, Sections Fifteen and Nineteen of the Texas Constitution and Amendments Seven and Fourteen of the United States Constitution for the Trial Court to have rendered judgment non obstante veredicto on the grounds of "No Evidence."

[Note—Under points 13 and 14, argued together, the appellants incorporated 24 pages of fact statement by reference and presented six pages of argument containing fourteen citations of authority.]

(Appellants' Amended and Supplemental Original Brief 3-6; Appellants' Brief Amending Point of Error Number Eleven 2; Appellants' Brief Amending Point of Error Number Twelve 2)

Opinion of the Court

The appellants Russell H. Sitton and wife brought this suit for actual and exemplary damages alleging that they were the victims of an unlawful conspiracy between the defendants by which they both suffered extensive emotionally induced physical injuries, including the recurrence to Mr. Sitton of a childhood speech impediment; it being also alleged that among other ill effects Mrs. Sitton on one occasion became so emotionally overwrought by the situation that she fell from a moving automobile and sustained serious injuries. The defendants, who are the appellees here, were American Title Company of Dallas, Katherine H. Brown and husband, Jarvis L. Brown (Mrs. Brown being alleged

to have been a notary public and manager, vice-president and alter ego of American Title Company), the American Insurance Company, alleged to have been the surety on the bond given by Mrs. Brown as a notary public; Leonard Cooksey Duckworth, a licensed real estate broker trading as Leonard Duckworth Agency; Trinity Universal Insurance Company, surety on Duckworth's bond as real estate broker; Harry Clifton Summer, Jr., a licensed real estate broker and vice-president of Duckworth Agency; Lawyers Surety Corporation, surety on Summer's bond as real estate broker; and Mr. and Mrs. Walter J. Moorman.

The appellants alleged that they agreed to exchange their home at 331 Andover Drive in Mesquite, Texas, on which was a mortgage securing a first lien note in favor of T. J. Bettes Company, insured and guaranteed by the Veterans Administration, for a home owned by Walter J. Moorman; that the transaction was handled by Summer as sales manager of the Duckworth Agency; that pursuant to arrangements made by that agency appellants went to the offices of American Title Company of Dallas, met with its vice-president, Katherine Brown, and executed a deed conveying their home to Moorman, leaving the deed with Mrs. Brown for further handling; that this deed provided that as part of the consideration therefor the grantee assumed and agreed to pay the balance owing on appellants' mortgage note; that thereafter, in order to defeat Moorman's liability to assume appellants' note his name was erased after appellants had executed the deed, and the name of one Trout was substituted therefor. They further alleged that Trout failed to pay the monthly installments on the note and the property was foreclosed, resulting in a substantial deficiency which they were called upon by the Veterans Administration and T. J. Bettes Company to pay; that they, being of limited education, became very frightened and emotionally upset over these developments, the loss of Mr. Sitton's veteran's benefits and the numerous demands by mail and telephone that the deficiency be paid, all of which resulted in the physical in-

juries which, together with the deficiency they were called upon to pay, were made the basis of their claim for damages.

The court sustained American Insurance Company's motion for summary judgment and this was affirmed in Sitton v. American Ins. Co., 390 S.W. 2d 34.

The case was submitted to the jury on numerous special issues, all of which were answered favorably to appellants, after which the court rendered judgment *non obstante veredicto* that appellants take nothing. In appealing to this court they assign fourteen points of error.

The appellee Moorman has filed a motion to strike and disregard all of appellants' points of error as being multifarious, too general and insufficient under Rule 418, Vernon's T.R.C.P. While this motion points up numerous inadequacies and defects in appellants' points of error, after reading the statements and arguments thereunder, we are of the opinion that the points do inform the court and opposing counsel of the contentions made by appellants. The motion is therefore overruled. Fambrough v. Wagley, 140 Tex. 577, 169 S.W. 2d 478; Rule 422, T.R.C.P.

Facts

Appellants pitch their case entirely on their contention that all of the appellees (except the sureties on the notary's and real estate brokers' bonds) conspired to effect the alteration of their deed, after they had signed it, in order to deprive them of a valuable right, viz., the assumption by Moorman of the balance owing on their mortgage indebtedness, to their great loss and damage because, while Moorman was a man of financial means and would have paid the debt, the substitute grantee, Trout, was of such poor financial worth that he did not pay the debt and could not be compelled to do so.

The contract of exchange, signed by Moorman and the appellants, was dated July 14, 1962 and provided that Moorman and wife sold and agreed to convey unto appellants

their property known as 2219 Pleasant Drive, Dallas, Texas for a purchase price of $11,500, and that the Moormans would take in trade appellants' home located at 331 Andover Drive, Mesquite, Texas, allowing them credit "for all down payment and closing costs in amount not to exceed $700.00." This contract did not specify the balance owing by appellants on their property, and it did not provide that Moorman would assume or agree to pay any such balance. This exchange of properties was arranged for by the appellee Summer and another employee of the Duckworth Agency. Appellants testified that they were assured by these two employees and Mrs. Brown that Moorman would assume the debt.

Appellants went to the American Title Company's branch office, where they met with the appellee Mrs. Brown, vice-president and manager of the branch office of the title company, and where they signed the deed conveying their property to the appellee Moorman. The deed recited as part of the consideration the assumption of, and the agreement "by the Grantee herein" to pay, the unpaid balance owing on the note given by appellants, in the original principal sum of $10,450, when they purchased the property. This deed was dated September 7, 1962. At some subsequent time the names of Moorman and his wife were erased in the four places where they appeared in the deed and the names W. R. Trout and wife, Joanne Trout, substituted therefor. There is some dispute in the testimony as to whether this erasure and alteration were made prior or subsequent to the signatures by appellants to the deed, but the jury found, and for the purposes of this opinion we shall assume, that it was done subsequently. Moorman called someone at the office of the title company and requested that the names of W. R. Trout and his wife be inserted as the grantees in the deed in lieu of his and his wife's names. Trout was an employee of Moorman's plumbing company. This substitution was made by someone in the office of the title company. Trout

failed to pay the installment due on appellants' note on May 1, 1963 and appellants thereafter, beginning in June 1963, began receiving letters from the Veterans Administration demanding payment, threatening foreclosure and telling appellants that unless they made satisfactory arrangements for curing the default they would lose their property and their credit standing in the community would be seriously affected and, in addition, that if the property should sell at foreclosure sale for less than the debt, they might become indebted to the United States Government for the deficiency. The property was foreclosed on in February 1964, and the Veterans Administration notified appellant Sitton by letter dated June 5, 1964 that he owed an indebtedness of $524.95 plus 4% interest because of the foreclosure on the property. This letter also contained this statement:

> "You may request a waiver of this debt if you feel this obligation arose out of compelling reason without fault on your part, and collection of the indebtedness would work a severe hardship on you or your family."

Sitton did not reply to that letter, and about six weeks later received another letter from the Veterans Administration dated July 20, 1964, remarking that no reply had been received to its former letter and that the debt "must be paid," and stating that:

> "Government regulations place a definite limit upon the time during which the Veterans Administration may handle the collection of debts before the matter is referred to the General Accounting Office for action, including referral to the Department of Justice, if required."

These and other communications from the Veterans Administration and T. J. Bettes Company caused the great emotional upheaval which appellants say caused the physical impairments which form the basis of their demand for damages in this case. Mrs. Sitton first learned of the foreclosure about April 1, 1964, and when she told her husband of it she became "terribly upset" and fell out of the car door and sus-

tained rather serious injuries necessitating heavy medical expenses.

Opinion

Underlying this claim is the supposition by appellants that Moorman had in some way assumed their indebtedness and agreed to pay it, but that the defendants conspired together to nullify that obligation by causing the Moormans' names to be erased from the deed (it being provided in the deed that the named grantee assumed the debt and agreed to pay it) and substituting therefor the name of Trout, who had a very poor credit rating and who defaulted.

In the first place, we find no evidence in the record, and our attention is directed to none, that any of the appellees conspired with any of the others to do any act having the effect of nullifying any enforceable agreement on the part of Moorman to assume or pay the balance owing on appellants' indebtedness. Neither do we find evidence that any two or more of them engaged in concerted action to accomplish any such purpose or agreed to do so. For that reason alone, appellants' case fails, for they assert liability exclusively on the theory of conspiracy, and no conspiracy is shown to exist in the absence of proof that two or more persons have combined or agreed to accomplish by concerted action some unlawful purpose, or to accomplish some lawful purpose by unlawful means. Great Nat'l Life Ins. Co. v. Chapa, Tex. Sup. Ct., 1964, 377 S.W. 2d 632; Kingsbery v. Phillips Petroleum Co., Tex. Civ. App., 315 S.W. 2d 561, wr. ref. n.r.e.

When we examine the evidence to determine whether in fact Moorman made any such enforceable agreement, all we find to that effect is the testimony of one McMaster, a loan service representative of the Veterans Administration, who testified on cross-examination that during his investigation in November 1964 Moorman told him that he had assumed the Sittons' indebtedness in connection with their exchange of houses. While this may have constituted some evidence

of the fact as against Moorman, it was clearly hearsay as to the other alleged conspirators.

There is no direct evidence, as distinguished from the foregoing evidence of admissions against interest, that Moorman ever agreed to pay or assume the debt, or that he ever accepted a deed reciting any such obligation on his part. Appellants argue that Mrs. Brown, who was present when they signed the deed, accepted it as Moorman's agent. However, we find no evidence that Moorman ever authorized Mrs. Brown to act as his agent in that respect, or that he ratified anything she did purporting to act as his agent. In fact, we find no evidence that Moorman ever knew that the deed contained the provision for assumption of the debt by the grantee named therein. The substitution of Trout's name for his as grantee was done at his request while the deed was still in possession of the title company and before it had been delivered to anyone. Moreover, neither we nor the appellants have a right to assume that if Moorman's name had remained as grantee in the deed he would have accepted it. The written contract of exchange did not obligate him to do so, and appellants make no effort in this suit to enforce any such obligation. Their suit is strictly one in tort for damages.

Appellees contend that even if there had been a conspiracy between them to do the wrongful act of which they are accused, the emotional disturbances and resulting injuries could not have been anticipated or foreseen by them and are therefore too remote to form the basis of a recovery against them. In reply appellants say that, since this is not a negligence case, it was not necessary for them to prove proximate cause. They contend that this case is similar to, and should be governed by the principles of law announced in, cases like Thompson v. Hodges, Tex. Civ. App., 237 S.W. 2d 757, wr. ref. n.r.e., where the plaintiff, a railroad worker, was assaulted by his yard master; and Eastern Texas Electric Co. v. Baker, Tex. Civ. App., 238 S.W. 335, reversed

on other grounds 254 S.W. 933, where a colored passenger in a streetcar was kicked by the conductor in a ruction over seating arrangements. It was held in those and other cases that proximate cause is not an issue where the injury or damage is inflicted willfully or intentionally, for in such a case the actor is presumed to have intended the consequences. 40 Tex. Jur. 2d, NEGLIGENCE, § 17, p. 468.

The rule is well stated as follows in 25 C.J.S., DAMAGES, § 25b, p. 489:

> "In the case of willful torts the wrongdoer is responsible for *the direct and immediate consequences* regardless of whether they might have been contemplated, foreseen, or expected. Where the act is criminal or unlawful, the wrongdoer is held liable not only for immediate and natural consequences but for all such consequential injuries *as might reasonably be anticipated as the possible result of the wrongful act.*" [Italics by the Court]

But that is not to say that the perpetrator of a willful, wrongful, or even criminal act is liable in damages for every harm, no matter how remote, that might be related to the act complained of. A defendant in such a case cannot be held responsible for remote consequential injuries that could not have been reasonably anticipated as a probable result of his act.

Appellants cite a number of cases, beginning with Hill v. Kimball, 76 Tex. 210, 13 S.W. 59, to establish the now well settled rule that recovery may be had for fright, accompanied by physical injury, caused by the defendant's deliberate or negligent act; but in each of those cases it was also held that the complainant was under the necessity of showing that the defendant's act was a proximate cause of the fright and injury and that the injury ought, in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof. One of the cases relied on by appellants is St. Louis & S.W. Ry. Co. of Texas v. Thompson, 102 Tex.

89, 113 S.W. 144, wherein Thompson sued several defendants as conspirators to recover damages, alleging they wrongfully and maliciously caused him to be expelled from his union, and wherein the Supreme Court held that if he could prove his expulsion was wrongful he would be entitled to recover against the conspirators "all damages which naturally flowed from such expulsion."

Appellants became interested in Moorman's house at 2219 Pleasant Drive in the summer of 1962 and the exchange was effected in September 1962. Apparently Trout paid the installments due on the Sittons' mortgage for several months, for the record is clear that the installments due each month until May 1, 1963 were paid. The letters which so upset the Sittons didn't start coming to them until some time in June 1963, after which four notices of foreclosure sales were posted to take place in October, November and December, 1963, with the foreclosure actually occurring in February 1964. At no time did appellants accept the Veterans Administration's invitation to request a waiver of the debt on the ground that the obligation for the deficiency arose without fault on their part and that its collection would work a severe hardship on them. Under these circumstances, can the appellants' injuries properly be said to have "naturally flowed" from the alteration of the deed? Were they "directly or immediately caused by the wrongful act"? We think each of these questions must be answered in the negative.

Appellants' Points of Error Nos. 1, 2, 3, 5, 6, 7, 8 and 9 assert error of the trial court in making certain "holdings" in the rendition of the judgment. We find no such "holdings" in the transcript; the judgment merely recites that the court is of the opinion that the defendants are entitled to judgment as a matter of law. It is our view that the evidence admits of no judgment other than that rendered, and that it must therefore be affirmed, regardless of the grounds or reasons the trial court may have thought controlling. 4 Tex. Jur.

2d, APPEAL and ERROR—CIVIL, p. 437, § 861; Fant v. Sullivan, Tex. Civ. App., 152 S.W. 515, 522, wr. ref.

Point No. 4 says the court erred in holding that there was no evidence to support any of the jury's findings that the deed in question was altered as a result of a conspiracy between Summer, Brown and Moorman, or any of them. This holding is implicit in the judgment rendered, and it should be clear from what we have said above that we agree that there was no such evidence.

The first nine points of error are overruled.

Their tenth point does not comply with Rule 418(b), T.R.C.P., in that it fails to direct our attention to any error relied on for reversal. It merely asserts that appellants are entitled to recover exemplary damages because they were injured by the unauthorized practice of law by the Title Company and Mrs. Brown; and then attacks the constitutionality of Article 9.01, Texas Insurance Code, insofar as it provides that title companies may supervise signing of legal instruments, deliver instruments and "close deals". By this point appellants attempt for the first time to raise an issue not mentioned in the pleadings or evidence in the trial court. Moreover, we see no merit in the point and overrule it.

By their Points of Error Nos. 11 and 12 appellants complain (11) of the refusal of the trial court to submit their requested Special Issues 18, 19, 19-A and 20 inquiring as to the amount of the deficiency due under the note in question after the foreclosure, and in rejecting Mrs. Sitton's testimony as to payments thereon, and (12), alternatively, of the failure of the trial court to render judgment for the foreclosure deficiency, the amount thereof being uncontroverted. Appellants having relied exclusively on the theory of conspiracy to establish any liability against appellees, and this court having held that there was no evidence of a conspiracy to alter the deed in question, or of alteration of the deed as a result of conspiracy, it follows that there was no reversible

error in rejecting either the special issues or the testimony, or in failing to render judgment for appellants for the foreclosure deficiency. Points 11 and 12 are overruled.

Like their tenth point, appellants' Points of Error 13 and 14 fail to complain of any specific error of the trial court. They merely assert that the judgment *non obstante veredicto*, having been rendered on grounds other than those specified in the motions therefor, and in the face of evidence of probative force supporting the verdict, was contrary to the laws of procedure and denied appellants due process and the equal protection of law guaranteed to them by Article 1, §§ 15 and 19, of the Texas Constitution and the Seventh and Fourteenth Amendments to the United States Constitution. The argument under these points does no more than trace the evolution of the jury system from its nebulous origins in the hazy mists of antiquity, extol its many virtues and accuse the trial court generally of substituting its fact determination for that of the jury. Our attention is directed to no specific evidence supporting any part of the verdict; nor is it demonstrated how appellants' said constitutional rights were violated. Our examination of the record discloses to us no such evidence and no such violation. Therefore, we say again that the motions for directed verdict should have been sustained and that the judgment *n.o.v.* was correct. Rule 301, T.R.C.P.; Bolin v. Pacific Finance Co., Tex. Civ. App., 278 S.W. 2d 879, no wr. hist. Points 13 and 14 are overruled.

All of the appellees except Lawyers Surety Corporation have filed numerous cross points which are entitled to, and have received, our careful attention. However, being of the opinion that a recitation of the testimony, special issues and jury argument complained of, together with a full discussion of our views thereon, would add nothing to an understanding of this case or be of "importance to the jurisprudence of the State," Rule 452, T.R.C.P., we merely indicate below our decision on each of these cross points.

Cross points of appellees American Title Company of Dallas, Katherine and Jarvis Brown:

Nos. 1, 6, 7, 8 and 9 are overruled.

Nos. 2, 3, 4 and 5 are sustained.

No. 10, being submitted conditionally on reversal, is not considered.

Cross points of appellees Duckworth, Summer and Trinity Universal Insurance Company:

Nos. 1, 2, 3, 4, 5, 6, 7 and 8 are overruled.

Nos. 9 and 10, being submitted conditionally on reversal, are not considered.

Cross points of appellee Moorman:

Nos. 1, 2, 3, 4, 7 and 10 are overruled.

Nos. 5, 6, 8 and 9 are sustained.

As we read this record, the trial court gave appellants every reasonable opportunity to make out a case against the appellees. We agree with the trial court that they failed to do so. The judgment is therefore AFFIRMED.

DELIVERED: October 29, 1965 (396 S.W. 2d 899-906)

American Cross-Points 2, 3, 4, 5 & 10
(Filed September 21, 1965)

Two The trial court improperly submitted Special Issues No. 1, and No. 2 in that these issues were not raised by the evidence and were submitted in an improper order and in that Special Issue No. 2 was duplicitous.

Three The court erred in submitting Special Issue No. 3, 4, and 5, for the reason that there was no evidence to warrant the submission of such issues.

Four It was error to submit Special Issues No. 4 and No. 5 for no evidence having been offered on the question of con-

spiracy, inquires as to Katherine Brown's status were not relevant to any issues raised.

Five The Court erred in submitting Special Issues Nos. 12, 13, 14, 15, 16, 17, 21, 22, and 24.

Ten The damage issues as answered by the jury were grossly excessive and should the Court reverse and render, it should order remittitur. (Brief for American, et al., 47-49)

Duckworth Cross-Points 9 & 10
(Filed September 24, 1965)

Nine The excessive award of damages and the verdict of the jury reflects the passion and prejudice which prevented the jury from considering the issues on their merits. For this reason, should this court find that the trial court erred in entering judgment *non obstante veredicto* this court should remand this cause to the trial court for new trial.

Ten In the alternative, should this court find that the trial court erred in entering a judgment for the Appellees *non obstante veredicto*, it should order a remittitur of the excessive damages awarded by the verdict of the jury. (Original Brief of Duckworth, et al. 8)

Moorman Cross-Points 5, 6, 8 & 9
(Filed September 29, 1965)

Five The trial court erred in the submission of special issue number twelve to the jury for the reasons that there was no evidence of probative force to support the submission of said issue, and as submitted it constituted a comment on the weight of the evidence and further contained a phrase improperly defined by the court.

Six The trial court erred in its submission of special issues numbered 13, 14, 15, 16, and 17 for the reason that there was no competent evidence of probative force to support the submission of said issues.

Eight The trial court erred in its submission of special issue number 21, for the reason that there was no competent evi-

dence of probative force to support the submission of said issue.

Nine The trial court erred in its submission of special issue number 24 for the reason that there was no competent evidence of probative force to support the submission of said issue. (Brief of Moorman, 10-11)

Judgment

Friday, October 29, 1965

Opinion of the Court delivered by Mr. Bateman, Associate Justice.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is in the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellees, American Title Company of Dallas, et al, have and recover of and from the appellants, Russell H. Sitton and wife, Barbara J. Sitton, and of the cash deposit in the hands of the District Clerk of Dallas County, made in lieu of an appeal bond, all costs in this behalf incurred or expended for which execution may issue, and that this decision be certified below for observance. (Transcript, Court of Civil Appeals, 3-4)

Appellants' Motion For Rehearing and Request for Supplemental Findings and Original Findings
(Filed November 15, 1965)

III-32 This Honorable Court erred in holding that no constitutional guaranties are involved when a trial court renders judgment n.o.v. in the fact of evidence of probative force supporting the verdict. (M. Rehg. 19)

III-34 This Honorable Court erred in holding that appellants' argument under their Points Thirteen and Fourteen

does no more than accuse the trial court generally of substituting its fact determination for that of the jury.

(M. Rehg. 19)

III-40 This Honorable Court erred in holding that its attention has been directed to no specific evidence supporting any part of the verdict and that the record discloses no such evidence; your appellants respectfully submitting that the record shows as follows with respect to the following special issues: [two page fact statement, single spaced, here omitted] (M. Rehg. 20)

III-41 This Honorable Court has denied to appellants due process of law and equal protection of the law under Article 1, Sections 15 and 19 of the Texas Constitution and Amendments VII and XIV of the U.S. Constitution in refusing to allow recovery on the jury verdict and in refusing to remand the case for a new trial: (M. Rehg. 22)

III-48 The act of this Honorable Court in affirming judgment non obstante veredicto and in refusing to remand the case on grounds of no conspiracy where the record discloses some evidence of probative force, as detailed in the Statement in Support of Request for Findings 1, 2 and 3 above and as detailed in Assignment of Error III-40 above, constitutes denial of due process of law and equal protection of law under Article 1, Sections 15 and 19 of the Texas Constitution and Amendments 7 and 14 of the United States Constitution guaranteeing the right of jury trial. (M. Rehg. 24a)

IV-14 This Honorable Court erred in overruling Appellants' Point of Error Fourteen as follows: "Inasmuch as there is evidence of probative force to support the jury verdict, it would have constituted denial of due process of law and equal protection of law under Article One, Sections Fifteen and Nineteen of the Texas Constitution and Amendments Seven and Fourteen of the United States Constitution for the Trial Court to have rendered judgment non obstante veredicto on the grounds of "No Evidence." (M. Rehg. 27)

III-8 This Honorable Court erred in holding that appellants would have received hardship relief upon the filing of a hardship claim or paupers oath with the V.A.; there being no evidence on the subject. (M. Rehg. 16)

III-10 This Honorable Court erred in holding that appellants failed to file a hardship plea or paupers oath with the V.A. because:

(a) there is no evidence on the subject;

(b) The evidence shows that they elected to pay the foreclosure deficiency commencing in September, 1964;

(d) The Honorable Court of Civil Appeals has undertaken to make a fact determination not submitted to the jury; the same was waived by appellees' failure to object or request issues;

(e) The Honorable Court of Civil Appeals has undertaken to make a fact determination not submitted to the jury; the case must be remanded for consideration of that question by a jury;

(h) Mrs. Sitton put defendants on notice of the appellants' peril by phone calls in the summer of 1963 but they persisted in their unlawful conduct; (M. Rehg. 16-17)

Order

Friday, December 3, 1965 This day came on to be heard the motion of appellants for rehearing of this cause, and for supplemental findings, and the same being inspected, it is considered, adjudged and ordered that the motion be overruled. (Transcript, Court of Civil Appeals, 4)

PROCEEDINGS IN THE SUPREME COURT OF TEXAS

Application for Writ of Error

(Filed Ct. Civ. App., January 3, 1966, Supreme Ct. Tex., January 5, 1966)

Point Eight-A The error of the Court of Civil Appeals in upholding the Trial Court's action of rendering fact findings contrary to fact findings of the jury that were based on

submissible evidence; the same being denial of due process of law and equal protection of law under Article 1, Sections 15 and 19 of the Texas Constitution and Amendments 7 and 14 of the United States Constitution. (App'n for Writ 48)

Point Eight-B The error of the Court of Civil Appeals in rendering fact findings contrary to fact findings of the jury that were based on submissible evidence, the same being the denial of due process of law and equal protection of law under Article I, Sections 15 and 19 of the Texas Constitution and Amendments 7 and 14 of the United States Constitution. (App'n for Writ 48)

Point Four-B The error the Court of Civil Appeals in holding that petitioners had any burden to seek administrative relief from the Veteran's Administration in order to prosecute this action; any failure to do so constituting no more than failure to mitigate or contributory negligence. (App'n for Writ 31)

Point Four-D The error of the Court of Civil Appeals in holding that petitioners were eligible for hardship relief with the Veteran's Administration. (App'n for Writ 32)

Order

March 9, 1966. Application of petitioners for writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no erorr requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Russell H. Sitton and wife, Barbara J. Sitton pay all costs incurred on this application. (Transcript, Supreme Ct. of Tex.)

Motion for Rehearing
(Filed March 24, 1966)

Point Eight-A This Honorable Court erred in not granting point 8-A of the writ application, to-wit: The error of

the Court of Civil Appeals in upholding the Trial Court's action of rendering fact findings contrary to fact findings of the jury that were based on submissible evidence; the same being denial of due process of law and equal protection of law under Article 1, Sections 15 and 19 of the Texas Constitution and Amendments 7 and 14 of the United States Constitution. (M. Rehg. 30)

Point Eight-B This Honorable Court erred in not granting point 8-B of the writ application, to-wit: The error of the Court of Civil Appeals in rendering fact findings contrary to fact findings of the jury that were based on submissible evidence, the same being the denial of due process of law and equal protection of law under Article I, Sections 15 and 19 of the Texas Constitution and Amendments 7 and 14 of the United States Constitution. (M. Rehg. 30)

Point Eight-C The error of the Supreme Court of Texas in upholding the action of the Court of Civil Appeals and the Trial Court wherein those Courts rendered fact findings contrary to the fact findings of the jury; which jury findings were based on submissible evidence; the same being denial of due process of law and equal protection of the law under Article 1, Sections 15 and 19 of the Texas Constitution and Amendments 7 and 14 of the United States Constitution. (M. Rehg. 30-31)

Point Four-B This Honorable Court erred in not granting point 4-B of the writ application, to-wit: The error of the Court of Civil Appeals in holding that petitioners had any burden to seek administrative relief from the Veteran's Administration in order to prosecute this action; any failure to do so constituting no more than failure to mitigate or contributory negligence. (M. Rehg. 27)

Point Four-D This Honorable Court erred in not granting point 4-D of the writ application, to-wit: the error of the Court of Civil Appeals in holding that petitioners were eligible for hardship relief with the Veteran's Administration. (M. Rehg. 28)

Order

April 6, 1966 Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled. (Transcript, Supreme Ct. of Texas)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The United States Constitution, Amendment Seven. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The United States Constitution, Amendment Fourteen, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C., § 1257(3). Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

38 U.S.C., § 1820(a)(4). Notwithstanding the provisions of any other law, with respect to matters arising by reason of this chapter, the Administrator may—

(4) pay; compromise, waive or release any right, title, claim, lien or demand, however acquired, including any equity or any right of redemption; and the authority to waive or release claims may include partial or total waiver of payment by the veteran, or his spouse, following default and loss of the property where the Administrator determines that the default arose out of compelling reasons without fault on the part of the veteran or that collection of the indebtedness would otherwise work a severe hardship upon the veteran.

Texas Constitution, Article I, Sec. 15. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. * * *

Rule 290, Tex. Rules Civ. Proc. * * * A special verdict shall, as between the parties, be conclusive as to the facts found.

Rule 291, Tex. Rules Civ. Proc. No special form of verdict is required, and the judgment shall not be arrested or reversed for mere want of form therein if there has been substantial compliance with the requirments of the law in rendering a verdict. No verdict shall be rendered in any cause except upon the concurrence of all members of the jury trying the case.

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In the

Supreme Court of the United States

No. 502

RUSSELL H. SITTON, et ux,
Petitioners,

v.

AMERICAN TITLE COMPANY OF DALLAS, et al,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

No. .....

RUSSELL H. SITTON, et ux,

Petitioners,

v.

AMERICAN TITLE COMPANY OF DALLAS, et al,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

The Respondents, American Title Company of Dallas, Katherine H. Brown and husband Jarvis Brown, Leonard Duckworth, Harry Clifton Sumner, Jr., Lawyer's Surety Corporation, and Mr. and Mrs. Walter J. Morman would respectfully show unto the Court that the Petition for Writ of Certiorari in the above cause should be denied.

LACK OF JURISDICTION

At Page 2 of Petitioners' Application for Writ of Certiorari, Petitioners submit that jurisdiction of this Court to entertain the writ is based upon 28 U.S.C. §1257 (3) and rely upon two areas to invoke such jurisdiction.

Respondents submit that the grounds set forth are without merit, and this Court does not have jurisdiction.

In inverse order, Petitioners state that the opinion of the Court of Civil Appeals "holds" that Petitioner Sitton is barred from recovery because of his supposed failure to apply to the Veteran's Administration for hardship relief, whcih "ruling" requires a construction of 38 U.S.C. §1870 (a) (4).

A careful review of the entire opinion written by the Court of Civil Appeals fails to reveal any "holding" or "ruling" to the effect claimed by Petitioners. The express ruling of the Court of Civil Appeals in this case is found at Page A-40 of the Petitioners' Application, in the second paragraph on that page. With no such "holding" or "ruling" as claimed by Petitioners, the second basis for invocation of this Court's jurisdiction, of necessity, falls.

Petitioners submit that they have been deprived of rights secured them by the Fourteenth Amendment to the Constitution of the United States. In the questions presented, Page 3 of Petitioners' Writ, and in the argument following, Petitioners assert the question to be one of application of the Seventh Amendment to the United States Constitution to the several states by virtue of the Fourteenth Amendment.

Petitioners say this Court has not rendered a decision directly concerning the application of the Seventh Amendment to the state courts for many years. (p. 18) Petitioners apparently overlooked the recent decisions of this Court, in 1947 and 1959, in the cases of *Fay v. New York*, 332 U.S. 261, and *Bartkus v. Illinois* 359 U. S. 121, where this Court again held that the Seventh Amendment of the Constitution is not made applicable to the several states by the Fourteenth Amendment. Petitioners claimed deprivation of rights under the Seventh Amendment by a state court would not invoke the jurisdiction of this honorable Court.

Under the same argument, Petitioners advance, in effect, the theory that the provisions of the Texas Rules of Civil Procedure for the granting of a judgment notwithstanding the jury's verdict, is violative of the due process clause of the Fourteenth Amendment. This theory has been foreclosed by this Court. *Walker v. Sauvinet* 92 U.S. 93. Here it was held that the requirement of the Fourteenth Amendment is met, if the trial is had according to the settled course of judicial proceedings, and that this process in the states is regulated by the law of the state. See also *White v. White* (Tex. Sup. Ct. 1917) 196 S.W. 508, 511.

The applicable rule of procedure, Rule 301, Texas Rules of Civil Procedure, formerly Article 2211 Vernon's Annotated Texas Statutes, has been held constitutional by the Courts of the State of Texas. *Johnson v. Moody* (Tex. Civ. App. 1937) 104 S.W. 2d 583, writ of error dismissed; *Sheppard*

v. City and County of Dallas Levee Improvement (Tex. Civ. App. 1937) 112 S.W. 2d 253, no writ history.

Therefore, Petitioners' Application for Writ of Certiorari should be in all things denied for want of jurisdiction.

COUNTERPOINTS TO QUESTIONS PRESENTED BY PETITIONERS

COUNTERPOINT ONE

(Replying to Petitioners' Question One)

Petitioner's Question One presents no question for adjudication within the jurisdiction of this Court.

COUNTERPOINT TWO

(Replying to Petitioners' Question One)

The due process clause of the Fourteenth Amendment does not require that the sovereign states observe the second clause of the Seventh Amendment to the United States Constitution.

COUNTERPOINT THREE

(Replying to Petitioners' Question One)

In the alternative, if the due process clause of the Fourteenth Amendment does require that the sovereign states observe the second clause of the Seventh Amendment, such clause was observed and the rights guaranteed thereunder were extended in this cause.

COUNTERPOINT FOUR

(Replying to Petitioners' Question Two)

Petitioners raise no constitutional question in their Question Number Two, in that such question inquires only whether the evidence in the cause raises a fact issue.

COUNTERPOINT FIVE

(Replying to Petitioners' Question Three)

Petitioners do not raise any question within the jurisdiction of this Court by virtue of their Question Number Three, in that such question simply requests the Court to search the record in the Trial Court to see whether there was an absence of evidence to support the jury verdict and, if so, whether the ruling of the Court denies Petitioners due process and equal protection of the laws.

COUNTERPOINT SIX

(Replying to Petitioners' Question Four)

Petitioners, in their Question Number Four, raise no question within the jurisdiction of this Court, in that the Texas Court of Civil Appeals did not hold that a veteran who elected not to invoke the hardship provisions of 38 U.S.C. 1820 (a) (4) was barred from seeking relief from third parties, and the construction of such statute was not necessary to a decision in this case.

COUNTERPOINTS ONE, TWO, AND THREE RESTATED

COUNTERPOINT ONE—(Restated)

(Replying to Petitioners' Question One)

Petitioner's Question One presents no question for adjudication within the jurisdiction of this Court.

COUNTERPOINT TWO—(Restated)

(Replying to Petitioners' Question One)

The due process clause of the Fourteenth Amendment does not require that the sovereign states observe the second clause of the Seventh Amendment to the United States Constitution.

COUNTERPOINT THREE—(Restated)

(Replying to Petitioners' Question One)

In the alternative, if the due process clause of the Fourteenth Amendment does require that the sovereign states observe the second clause of the Seventh Amendment, such clause was observed and the rights guaranteed thereunder were extended in this cause.

STATEMENT, ARGUMENT, AND AUTHORITIES UNDER COUNTERPOINTS ONE, TWO, AND THREE

Petitioner presents no issue in Question One or the argument thereunder within the jurisdiction of this Honorable Court. Question One, as presented, is merely a rhetorical statement; it amounts only to a request for an advisory

opinion. Petitioner makes no showing that this Court's answer to Question One would either grant or deny him relief, for he makes no showing that even if the Second Clause of the Seventh Amendment does apply to the state courts, the rights guaranteed thereunder were not extended to Petitioner. Petitioner makes no showing or argument that he did not receive a trial by jury in accordance with the stipulations of the Seventh Amendment to the United States Constitution.

Your Respondents would show, however, that the Second Clause of the Seventh Amendment does not apply to proceedings in state courts. Petitioner cites numerous cases holding that the First Clause of the Seventh Amendment does not apply to the states through the due process clause of the Fourteenth Amendment. Most of the cases cited by Petitioner hold either directly or by necessary implication, that the Second Clause of the Seventh Amendment does not apply to the states either. Because it is not mandatory for the states to provide trial by jury in civil causes, it must be held that if a state does provide trial by jury, it may also provide reasonable rules governing the process and procedure of such trial. The cases upholding this point are legion. See, for example, *Fay v. People of New York*, 332 U.S. 261 (1947). In that case, this Court stated:

> "[I]t steadily has been ruled that the commandments of the Sixth and Seventh Amendments would require jury trial in criminal and certain civil cases are not picked up by the due process clause of the Fourteenth so as to become limitations on the states. This Court has ruled that consistently with those amendments,

> ' trial by jury may be modified by a state or abolished altogether.' *Palko v. State of Connecticut*, 302 U.S. 319 and cases there cited."

Conceivably, the trial procedure provided by a state court could violate due process of law. Such is not the case at bar, nor is it the proposition raised by Petitioners. Petitioners would have this Court hold that all judgments non obstante veredicto are ab initio unconstitutional.

Such a holding would require the Courts and legislatures of every state of the Union to alter their rules of judicial procedure. Moreover, such a holding would violate Rule 50b of the *Federal Rules of Civil Procedure*. Rule 301 of the *Texas Rules of Civil Procedure* is similar to Rule 50b of the *Federal Rules of Civil Procedure*. Rule 301 provides that judgment non obstante veredicto may be granted only if a directed verdict would have been proper. This rule has been construed much the same as Rule 50b, in that judgment non obstante veredicto may be entered only when, from the facts, there is no evidence of probative force in favor of the judgment. Under Rule 301, judgment non obstante veredicto may be entered only when, from the evidence, reasonable minds could not differ on the result. That rule was observed and followed in the case at bar. The trial judge, the Honorable Court of Civil Appeals for the Fifth Judicial District of Texas, and the Honorable Supreme Court of Texas, by its refusal to hear Petitioners' Writ of Error, have held that there is no evidence to support the verdict that was rendered upon the trial of this cause. The Petitioners produced no evidence of any probative force to sustain the allegation of their petition.

COUNTERPOINTS FOUR AND FIVE RESTATED

COUNTERPOINT FOUR—(Restated)

(Replying to Petitioners' Question Two)

Petitioners raise no constitutional question in their Question Number Two, in that such question inquires only whether the evidence in the cause raises a fact issue.

COUNTERPOINT FIVE—(Restated)

(Replying to Petitioners' Question Three)

Petitioners do not raise any question within the jurisdiction of this Court by virtue of their Question Number Three, in that such question simply requests the Court to search the record in the Trial Court to see whether there was an absence of evidence to support the jury verdict and, if so, whether the ruling of the Court denies Petitioners due process and equal protection of the laws.

STATEMENT, ARGUMENT, AND AUTHORITIES UNDER COUNTERPOINTS FOUR AND FIVE

Petitioners' Questions Two and Three simply ask the Court to weigh the evidence in this case. It has been held in the following cases that a Writ of Certiorari will not be granted to review evidence: *General Talking Pictures Corp. v. Western Electric Company*, 58 S. Ct. 849, 59 S. Ct. 116, 59 S. Ct. 355. *U.S. v. Johnston*, 45 S. Ct. 496. Thus, this Honorable Court would not grant a Writ of Certiorari to review a decree on the ground that the evidence was not

sufficient to establish actual dedication of Petitioners' property to public use. *Southern Power Company v. North Carolina Public Service Company*, 44 S. Ct. 164.

While this Court can review a decision of a state court on a question pertaining to evidence where a federal question is otherwise involved, it does not have jurisdiction to determine sufficiency of evidence absent the federal question. *Whitney v. People of State of California*, 47 S. Ct. 641. *Van Oster v. State of Kansas*, 47 S. Ct. 133.

Where the lower court has found that there was no evidence on a certain issue, the rule is that if, in fact, there is no such evidence, or if the evidence is conflicting, the Supreme Court of the United States can inquire no further. Only if the uncontradicted evidence affirmatively establishes the facts contrary to the finding can this Court ignore that finding. *Baltimore and O.S.W.R. Co. v. Burtch*, 44 S. Ct. 165.

COUNTERPOINT SIX—(Restated)

(Replying to Petitioners' Question Four)

Petitioners, in their Question Number Four, raise no question within the jurisdiction of this Court, in that the Texas Court of Civil Appeals did not hold that a veteran who elected not to invoke the hardship provisions of 38 U.S.C. 1820 (a) (4) was barred from seeking relief from third parties, and the construction of such statute was not necessary to a decision in this case.

STATEMENT, ARGUMENT, AND AUTHORITIES UNDER COUNTERPOINT SIX

The Texas Court of Civil Appeals did not hold that a failure to seek relief under the hardship provisions of the applicable statute barred a veteran from seeking relief from third parties. The Court, in referring to the letters from the Veteran's Administration concerning a waiver of Petitioners' indebtedness was dealing with the question of causation. The Petitioners, having alleged that their injuries flowed from the act of the alteration of the deed, the Court of Civil Appeals was simply pointing out that the harassment which had occurred by the Veteran's Administration might not have occurred had Petitioners sought the remedy available to them. So the Court said, "Under these circumstances can the Appellants' injuries properly be said to have 'naturally flowed' from the alteration of the deed? Were they 'directly or immediately caused by the wrongful act'? We think each of these questions must be answered in the negative."

Thus, there was no holding that failure to apply for relief to the Veteran's Administration barred an action against the third party. All the Court was saying was that in proving causation Petitioners had to show that the injuries sustained by them were direct and immediate consequences of the act of the Respondents. And the Court was pointing out that the chain of causation was broken.

CONCLUSION

WHEREFORE, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

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IN THE

Supreme Court of the United States

October Term, 1966

NO. 502

RUSSELL H. SITTON, ET UX., *Petitioners,*

v.

AMERICAN TITLE CO. OF DALLAS, ET AL., *Respondents*

On Petition for a Writ of Certiorari to The Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

For reply to the Respondents, your petitioners would show the following:

JURISDICTION

Respondents assert lack of jurisdiction because, in their opinion, "the grounds set forth are without merit." To avoid repetition, we shall answer as we reply to their counterpoints. It is submitted that the Federal questions here asserted have been timely and properly raised so as to preserve the jurisdiction of this Court.

REPLY TO COUNTERPOINTS

By their points one, two and three, respondents contend that the re-examination clause of the Seventh Amendment is inapplicable. They further assert "such clause was observed," but we fail to find any meaningful argument under the latter proposition.

They attack our statement that the Supreme Court has *never* directly ruled whether the re-examination clause operates as a restriction against the overturning of jury verdicts in the state courts. However, the *Fay, Bartkus* and *Palko* cases cited by them are criminal cases and anything said concerning the Seventh Amendment was dicta in the entirely. As submitted on our page 10, *Walker v. Sauvinet,* 92 U.S. 90, has nothing to do with the power of state courts to disregard jury verdicts. The Supreme Court has ruled on the matter in F.E.L.A. cases and has consistently held that jury verdicts may not be overridden because "Jury trial—guaranteed by the Seventh Amendment" is "part and parcel of the remedy." *Harris v. Penna. R. Co.,* 361 U.S. 15 (Our emphasis).

We have no argument with the Texas cases cited. One holds that the uncorroborated testimony of a party creates a jury issue even when his testimony is denied by disinterested witnesses;[1] another that an "exclusive" easement grants, in effect, a fee simple title,[2] a pure question of law; and the third that jury trial may constitutionally be abolished in insanity cases.[3]

We do not attack all judgments *non obstante veredicto*, Neither do we attack *Rule 301*, Tex. Rules Civ. Proc., although we agree that it is similar to *Rule 50b*, Fed. Rules Civ. Proc. We assert the Texas law to be constitutional on its face, unconstitutional in its application. We ask that *Texas Rule 301* be held subject to the same restrictions as Federal *Rule 50b. Dick v. New York Life Ins. Co.,* 359 U.S. 437.

Respondents infer but stop short of asserting that inasmuch as the states may abolish juries, their courts may ignore jury verdicts. Numerous cases dealing with the Sixth

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[1] **Johnson v. Moody,** 104 S.W.2d 583 (Tex.Civ.App. 1937).

[2] **Sheppard v. City and County of Dallas Levee Improvement Dist.,** 112 S.W.2d 253 (Tex.Civ.App. 1937).

[3] **White v. White,** 108 Tex. 570, 196 S.W. 508 (1917).

Amendment have held that when trial by jury is provided for by state law then "the constitutional concept of trial by jury" must be provided. *Turner v. Louisiana*, 379 U.S. 466. We ask for like construction of the Seventh.

It is asserted that the state courts found no evidence but the evidence is plain for those who would wish to see. The jury, not the Court is the fact-finding body. Respondents boldly assert "from the evidence, reasonable minds could not differ on the result" (p. 8) but they carefully avoid any discussion of the evidence. Testimony that "Moorman told me he had her do it and she told me she did it" (Pet'n. A-10) is difficult to ignore, impossible to explain.

By their points four and five, respondents contend that the Court will not pass on "a fact issue." They cite *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 546, 305 U.S. 124, 675, stating "granting of the writ would not be warranted *merely* to review the evidence" (305 U.S. 178) (Our emphasis), a situation not here applicable. Certain other authorities cited were decided under the old writ of error practice, eliminated in 1925, which only brought questions of law before the Court. The Court now reviews by certiorari, a specific ground for the writ being:

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court * * *." *Rule 19*, U. S. Supreme Ct. Rules.

The opinion below notes the petitioners' assertion "that the judgment *non obstante veredicto*, having been rendered * * * in the face of evidence of probative force * * * denied appellants due process and the equal protection of law guaranteed to them by * * * the Seventh and Fourteenth Amendments * * *." The Court rejected this argument declaring it had not been demonstrated "how appellants' said constitutional rights were violated" (Pet'n. A-45). Considering the Court's statements that "we shall

assume" the instrument was changed after its execution, that grantee Moorman "requested" the alteration, that the alteration was performed by "someone in the office of the title company", and petitioners' testimony that "they were assured" that grantee Moorman "would assume the debt" (Pet'n. A-38), it can hardly be more obvious that the Texas Court of Civil Appeals has refused to consider itself bound by the clause against re-examination bringing the case directly within the provisions of *Rule 19*.

"* * * The duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick v. Scurlock*, 347 U.S. 110, 121. See also *Harris v. Penna. R. Co.*, 361 U.S. 15 (concurring opinion).

By our question 3 and on pages 23-27 of the Petition, we presented the proposition that the judgment notwithstanding the verdict was "so totally devoid of * * * support" as to directly violate the Due Process Clause. *Thompson v. Louisville*, 362 U.S. 199. We fail to see where respondents' point five or the argument thereunder meets the authorities presented.

By point six, respondents contend that the Court below did not pass upon the veteran's relief statute, *38 U.S.C. § 1820(a)(4)*, which says that the debt may be waived where it:

> "arose out of compelling reasons without fault on the part of the veteran or that collection of the indebtedness would otherwise work a severe hardship upon the veteran."

The opinion quotes from V. A. letter received by petitioners stating that they could request a waiver if they felt the debt:

> "'* * * arose out of compelling reason without fault on your part, and collection of the indebtedness would work a severe hardship on you * * *'" (Pet'n. A-39).

> "* * * Can the appellants' injuries properly be said to have 'naturally flowed' from the alteration * * *? We think each of these questions must be answered in the negative" (Pet'n. A-43).

The statute is not expressly cited but did the State Court presume for a moment that the V.A. was acting on personal initiative and without statutory authority? Such a violent presumption cannot be entertained. The evidence contains no showing that petitioners would have received relief (contributory negligence, failure to mitigate and the like being a defensive burden) and there is particularly no showing that forgers and intermeddlers are within the class of beneficiaries under the statute.

What the evidence does is that the Sittons attempted to pay rather than petition for pauper relief and their right to so elect is a matter of FEDERAL LAW; a point upon which the Supreme Court would defer to no state court. If a car jumps the curb and strikes a pedestrian, may the Court overturn a jury verdict and refuse judgment on the ground that the pedestrian should have taken to the street? It is fundamental that there can be no negligence where there is no duty. *MacLean v. Parkwood, Inc.*, 247 F.S. 188 (1965), affd. 354 F.2d 770. (1966). The exact same principles are involved where it is alleged that the plaintiff failed to exercise ordinary care.

Respondents have taken no notice of our propositions that (1) there are other damages in the case and the claims for mental distress and physical suffering are not material to the granting of the writ and (2) the Seventh Amendment requires that any questions of the plaintiff's failure to observe the prudent man rule be decided by the same finder of fact that passes on the defendant's failure to do so. See pages 35-38 of the Petition.

Propositions Not Answered

If the Court is looking to the respondents to explain or elaborate on the (to our thinking) enigmatic decision of

the Court of Civil Appeals, it will be disappointed. They virtually ignore the opinion below because (to our thinking) they can neither explain it nor defend it. We have set forth several propositions in the Petition that must have escaped them because they are ignored.

(1) We have presented extensive facts and have submitted that the evidence met "any standard which might be appropriate—state or federal." *Mercer v. Theriot*, 377 U.S. 152. Respondents have quietly refrained from the slightest discussion of the specific evidence. It is all adverse to their position.

(2) We have submitted and here re-submit that we cannot visualize a stronger case of conspiracy nor can we hypothetically set out any state of facts under which the Court would have deemed the case worthy of a jury's consideration. Respondents have no reply. They also are unable to imagine a stronger state of facts than the one here presented.

(3) We have presented that the Court's decision, in spite of any vagaries in its opinion, was based on a purported lack of evidence and not on any principles of law. Respondents must agree for they are wholly silent on the matter.

(4) We have presented that there are no principles of state law, unassociated with questions of proof, that would justify the outrageous breach of fiduciary responsibility shown by this record or release these tort feasors from liability, Respondents have no reply because they know of none.

In short, respondents have presented no law and no construction of the facts that would entitle them to a judgment. The case was defended before the jury on the assertion that the alteration took place before execution of the deed and that petitioners must be presumed to have consented to the alteration; although it was admitted that they did not secure the petitioners' express consent. Having

lost this issue to the jury, respondents contended on appeal that (1) the proof of conspiracy was based on "surmise and conjecture," and (2) there is no proof of "concerted action," which they insist is an element of the tort but which they consistently refuse to define. Their briefs are available and they are as inconclusive concerning the facts as their brief in this Court. We submit that the jury's answer to question number two is just as binding as its answer to question number one (Pet'n. A-26) and that the Court's refusal to enter judgment on the verdict was violative of petitioners' Constitutional rights.

One can only read with astonishment the state court's assigned basis of "no evidence" for its decision and declare, like the forthright child in the Fable of the Emperor's Clothes, "but the evidence is there!" Yes, the evidence supporting the jury verdict is there. It was presented in open court, the jury heard it and entered its verdict upon it, the reporter made a record of it, and that record is now before this Honorable Court. And that evidence cannot now be discredited by mere denials of its existence, no matter how strident the utterance nor how obliquely that evidence is presented.

If we may be permitted to indulge in a generality, it would seem that the result to date in the case at bar affords an understanding, if disturbing insight into the deep attachment for the institution of trial by jury professed by laymen and lawyers alike. The Missouri Bar-Prentice Hall Survey has received wide attention. In that survey, it was perhaps predictable that the public, by a 2-1 majority would prefer jury trials; but a shocking fact was that 74% of the lawyers interviewed gave an opinion that "wealth, social position and race affected the standards of justice". *The Missouri Bar-Prentice Hall Survey: A Motivational Study.*, pub. by the Mo. Bar, 1963, pp. 164, 175.

Whether or not the state court in the case at bar might have held some motivating but undisclosed reason for its

decision can only be a subject of curiosity and speculation. However that may be, subjective considerations can never form a proper basis for destruction of a verdict duly returned by the chosen finder of fact. Clearly, the assigned reason of "no evidence" constitutes a direct denial of the due process granted by the Fourteenth Amendment and an usurpation of the right to jury trial.

The very week following the decision of the case at bar, the Honorable Court below reversed a judgment where the trial court failed to submit a question—Did the plaintiff sustain any injury? — in addition to the question — How much damages, if any, should the plaintiff recover for his injuries, if any? The grounds assigned were that the defendant was deprived of its Constitutional right to a jury verdict on the issue of injury. *P. T. Whitlock Gas & Oil, Inc. v. Brooks,* 396 S.W.2d 922 (Tex.Civ.App. 1965). May we suggest that plaintiffs are equally entitled to a jury verdict on the matters in issue.

Motion For Joint Consideration

There are two other cases pending before this Court where it is asserted that the state court has invaded the fact finding function of the jury contrary to the re-examination clause of the Seventh Amendment. Certiorari has been granted in No. 48, *Heider v. Michigan Sugar Co.*, from the Supreme Court of Michigan. Certiorari has been denied in No. 388, *King v. Vico Insurance Co.*, from the Louisiana Court of Appeal and a petition for rehearing is imminent. While the case in hand goes much farther in usurping the function of the jury than either of these cases, all three present differing facets of the same problem. Petitioners have filed a Motion for Joint Consideration of the three cases to which the Court's attention is respectfully directed.

Prayer

To protect our Constitutional heritage of trial by jury as an institution and not as a mere formalism, your petitioners respectfully request that certiorari be granted.

Respectfully submitted,

November 2, 1966

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IN THE

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October Term, 1966

NO. 502

RUSSELL H. SITTON, ET UX, *Petitioners,*

v.

AMERICAN TITLE CO. OF DALLAS, ET AL.,
Respondents

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI WITH PRAYER FOR ALTERNATIVE RELIEF

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI WITH PRAYER FOR ALTERNATIVE RELIEF

Your petitioners, Russell H. Sitton and wife, Barbara J. Sitton respectfully petition for rehearing as follows:

I.

Petitioners ask that the Court grant rehearing of its order of December 5, 1966 denying their petition for a writ of certiorari.

II.

In the alternative, petitioners ask that certiorari be granted limited solely to the question whether petitioners are entitled to indemnity for their debt to the United States, the matter being of great importance inasmuch as more than six million homes have been financed under the Veteran's Loan Guaranty Program.

III.

In the further alternative, petitioners ask that certiorari be granted limited solely to Question 3 of their petition (page 3, 23-27); that is, disregarding the seventh amend-

ment question, is the judgment of the Texas Courts so fundamentally unfair as to violate the Fourteenth Amendment?

IV.

In the further alternative, petitioners ask that the judgment of the Texas Court of Civil Appeals be vacated and that the cause be returned to that Court for any further proceedings deemed appropriate with request that separate and specific findings of fact and of law be entered.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRITS

The plaintiffs were a veteran and his wife, the defendants were obvious fiduciaries, the cause of action was for forgery, no less.

The jury saw and heard the witnesses including a government agent relating the defendants' own admissions. The verdict was "guilty."

The Court of Civil Appeals said: "For the purposes of this opinion, we shall assume" that the forgery occurred. Nevertheless, the jury verdict will be overturned, we grant you nothing, not even nominal damages and assess you with all costs of this proceeding. *Your Constitutional rights have not been violated.*

This Court has said: "Certiorari denied;" for what reason, we do not know.

We have read the opinion of the Court below many times, and the grounds of the Court's ruling remain, at least to us, obscure. It is the province of the Court, particularly the appellate courts, to declare the law. Surely, if there is some principle of state law which discharges these fiduciaries from liability where the evidence discloses that they have misrepresented a real estate transaction to a G.I. couple with 8th and 10th grade educations and have altered the papers behind their backs, it should be clearly and succinctly stated.

The failure of a court to rule, the refusal of a court to rule, or the entry of rulings on obscure, superficial or non-existent grounds constitutes the denial of due process when the procedure departs from those fundamental notions of fair play and justice that lay at the root of our system of laws. *Postal Telegraph & Cable Co. v. Newport,* 247 U.S. 464; *Shuttlesworth v. Birmingham,* 15 L.Ed.2d 176.

"The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry." *Truax v. Corrigan,* 257 U.S. 312. Counsel are confident that the Court below is well qualified to deliver much more definitive opinions. We can only speculate as to the cause of its failure to do so in the instant case. It is submitted that "the judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a mere personal judgment." *Malinski v. New York,* 324 U.S. 401, 417 (Concurring opinion).

However, petitioners do not believe that the Court undertook to rule on the law in this case. We find thirteen separate declarations of "no evidence" in the Court's opinion. There is ample evidence that a forgery occurred. The Court declared, "we shall assume" as much. Why then does it deny relief? One can only surmise. Possibly, the Court held that there was no proof of "concerted action," but how is this nebulous element of the tort defined? The opinion is silent. How is it to be proved? Hypothetically speaking, what witness could have testified to what state of facts whereby the existence or non-existence of this subjective and highly ephemeral element would have been transformed into a question of fact as to which reasonable men might differ and thereby create a jury issue? Compare *U.S. v. General Motors Corp.,* 16 L.Ed.2d 415.

Lay aside the Seventh Amendment question for a moment. Assume that the state courts have no obligation under the Fourteenth Amendment to observe the Seventh Amendment standards for the overturning of jury verdicts. Does this mean that they are free to proceed with no standards at all? Does this mean that the Courts may Constitutionally ignore unbiased third party testimony that "Moorman told me he had her do it and she told me she did it" (Testimony 403), and judiciously declare: "The trial court gave appellants every reasonable opportunity to make out a case.* * * They failed to do so?" (Opinion, see Pet'n. A-46).

It will be difficult to find a case where the Court below has gone as far as the case in hand in overriding jury findings. There is nothing to prevent the invasion of the jury's province by the judiciary other than self restraint. The power inevitably increases with its exercise. If jury trial is ever reduced to pure formalism with the Court free to override verdicts at will, the jury system will become the common man's nightmare instead of his refuge. A long and arduous trial before a jury will be only a preliminary to recovery. A man may lose his case either to the court or to the jury. He must convince both of the facts of his case in order to recover. His burden of proof is doubled.

This Court has held in a number of decisions, all at least thirty years old, that a state may Constitutionally abolish the civil jury. Contrary to respondents' position, such holdings are not authority for state courts to ignore jury verdicts or withhold judgment on a verdict at will. Due process requires not only fair and reasonable laws but the uniform and non-discriminatory application thereof. Petitioners ask for no more. *National Union, M.C.&S. v. Arnold*, 348 U.S. 37; *Griffin v. Illinois*, 351 U.S. 12.

If a state must follow fair and reasonable standards to evaluate and overturn jury verdicts, what measure of reasonableness must be employed? The common law standard spelled out in the Seventh Amendment is the most

logical standard. It is the historic standard, it is the only standard that marks the division between the authority of the Court and the jury with any clarity; the only standard that insures that jury verdicts will be meaningful. *The Supreme Court has never ruled on the Constitutional minimum standards under which state courts may override jury verdicts.* It appeared to us that the question would be reached in *Heider v. Michigan Sugar Co.*, No. 48 at this term, but the petitioner declared in his opposition to our motion for joint consideration that his case in no wise concerned the Seventh Amendment. The writ in that case has been dismissed.

While the question has never been answered, it has been presented a number of times. Within the past two years, the following petitions for certiorari appear to have all presented the contention that the state court violated Seventh Amendment standards for the re-examination of jury verdicts:

Rucker v. Fifth Ave. Coach Lines, 382 U.S. 815, Certiorari Denied; opinion below, 15 N.Y.2d 516, 202 N.E.2d 548;

United Specialty Adv. Co. v. Furr's Inc., 382 U.S. 824, Certiorari denied; opinion below, 385 S.W.2d 456;

Carter v. Winter, 382 U.S. 825, Certiorari denied; opinion below, 32 Ill.2d 275; 294 N.E.2d 755;

Mitchell v. Malvern Gravel Co., 382 U.S. 828, Certiorari denied; opinion below, 238 Ark. 848, 385 S.W. 2d 144;

Jones v. Faroni, 383 U.S. 909, Certiorari denied; unreported below. (S.Ct.Ohio);

Sule v. Missouri Pac.R.R.Co., No. 174, Oct. Term, 1966, Certiorari denied October 10, 1966; opinion below, 181 So.2d (La.Ct.App.);

Vassos v. Ornstein, No. 358, Oct. Term, 1966, Certiorari denied October 10, 1966; unreported below (From N.Y. S.Ct., A.D.);

King v. Vico Ins. Co. of St. Louis, No. 388, Oct. Term, 1966, Certiorari denied October 10, 1966; opinion below, 182 So.2d 135.

We do not claim that the contention was well taken in all or any of these cases. We do present that the question is timely, it is important and it should be answered.

It has been said that hard cases make bad law. In such instance, it appears to petitioners that this case must be a hard one indeed because it abounds with bad law. We thought it was a plain case of forgery and that neither the court nor the jury would have any trouble in seeing the defendants as wilful wrongdoers taking advantage of the very people they held themselves out to protect. It appears that we were only half right. Respondents' counsel were shrewd, indeed. They called no witnesses, waived cross-examination of the plaintiffs and alienated the jury with multitudinous objections. On appeal, they filed no propositions concerning the sufficiency of the evidence and thereby barred themselves from claiming the right to a new trial. The case was presented to the Court of Civil Appeals on an all or nothing basis.

Apparently the Court felt that $90,000 was too much even though there were separate awards of actual and exemplary damages against five defendants in favor of two different plaintiffs. Petitioners feel that the jury saw the defendants as they are and dealt with them likewise, but possibly the Court of Civil Appeals was conscience striken. If counsel planned to drive the damages up to a point where a judgment thereon would be refused, then they have played their dangerous game to perfection.

At this point, petitioners feel that anything is better than nothing. Certainly, somebody ought to be liable for something when a title company, a real estate broker and a grantee commit forgery upon the deed for a G.I. home. If the Supreme Court is not prepared to consider the claim for mental suffering because of time or policy or other

limitations, petitioners ask that certiorari be granted with respect to their claim to recover the amount of the mortgage deficiency which is their "hard money damages."

Petitioners again submit that there is no principle of state law which would discharge from liability those guilty of forgery by fiduciary. However, we would be the first to concede that the opinion of the court below leaves the matter completely up in the air. If there is any doubt in the minds of this Court whether there might be a reasonable basis for the decision of the Court of Civil Appeals, we submit that the Supreme Court can and should vacate the decision below for further proceedings and the clarification of its decision. *Minnesota v. National Tea Co.*, 309 U.S. 551.

> "A litigant is entitled to at least one tolerably fair trial regardless of the nature of his offense * * * and to this end we have made our ruling." Bird, J., in *Shawhan v. Kentucky*, 318 S.W.2d 541 (Ky. 1958)

Your petitioners ask no more.

CONCLUSION

For the reasons set forth above and in their original petition for certiorari, petitioners respectfully move for rehearing, for the grant of certiorari and for so much of the alternative relief set forth above as the Court may deem proper.

December 27, 1966

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of the Supreme Court.

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Attorney for Petitioners.